(1) Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, ROBERT STEIN, and ROBERT JAQUEZ,

*Petitioners,*

*vs.*

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.; SANTA FE TERMINAL SERVICES, INC.; SANTA FE PACIFIC CORPORATION; IN-TERMINAL SERVICES, INC.; and MI-JACK PRODUCTS, INC.,

*Respondents.*

*On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Is a lower court when importing an analogous state statute of limitation in a case under Section 510 of ERISA free to disregard the "duty" imposed by this Court in *Reed v. United Transportation Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) "to assure that the importation of state law will not frustrate or interfere with the implementation of national policies"?

(a) May a lower court apply a one-year statute of limitation to Section 510 cases in one state after holding that applying a one-year statute in another state would interfere with the federal policy that underlies ERISA?

2. Do the wide disparities between the circuit courts of appeal and among the states within their respective ambits, and the unpredictable results of their efforts to analogize limitations for Section 510 cases, create such confusion and uncertainty as to constitute interference with the implementation of Section 510 or a frustration of the underlying Congressional purpose?

3. Should the Court resolve the difficulties of analogizing under Section 510 by the lower courts by analogizing to other provisions of ERISA and adopting their three-year limitation periods to create a uniform national statute of limitation for Section 510?

(a) In claims such as the Petitioners' involving multiemployers benefits plans, should a uniform federal statute of limitation for Section 510 cases be analogized from ERISA's three-year period under Section 4301 established for multiemployer plan litigation to fulfill the purpose of ERISA to regulate multiemployer plans throughout interstate commerce?

4. Does failure to plead a statute of limitations defense until after remand from the Supreme Court constitute a waiver of the defense or bring the doctrine of equitable estoppel into play?

(a) May a court import and apply a newly-derived state rule of limitation long after a case has begun without also applying that state's rules of waiver and equitable estoppel?

## LIST OF PARTIES TO PROCEEDING

Inter-Modal Rail Employees Association, a nonprofit mutual benefit corporation:

Thomas Franks, proposed class-action representative

Charles Jones, proposed class-action representative

Tommie Martin, proposed class-action representative

Hoyt Jarrard, proposed class-action representative

Robert Stein, proposed class-action representative

Refer to Appendix for other IMREA members

The Burlington Northern & Santa Fe Railway Company f/k/a The Atchison, Topeka and Santa Fe Railway Co.

Burlington Northern Santa Fe Corporation

Santa Fe Terminal Services, Inc.

In-Terminal Services, Inc.

Mi-Jack Products, Inc.

Interested parties include the following entities that appeared as *amici curiae* before the Court in its previous consideration of this case (No. 96-491):

U.S. Department of Labor

American Association of Retired Persons

National Employment Lawyers Association

The Employers Group representing nearly 5,000 member employers

The National Association of Manufacturers representing 14,000 member companies and 350 member associations

The Association of American Railroads representing 79 member railroads, including the following:

Alton & Southern Railway
Amtrak
Canadian National
Canadian Pacific
Conrail
CSX Corporation
Illinois Central
Kansas City Southern
Manufacturers Railway
Metra
Norfolk Southern
RailAmerica
RailTex
Texas Mexican Railway
Tri-Rail
Union Pacific (including entities formerly known as Southern Pacific and Missouri Pacific)
Vermont Rail Systems
Winston Salem Southbound Railway
Ferrocarril Mexicano, Special Member
Railway Association of Canada, Special Member
Transportacion Ferroviaria Mexicana, Special Member

# TABLE OF CONTENTS

*Page*

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF PARTIES TO PROCEEDING ..... iii

TABLE OF CONTENTS ..... v

TABLE OF AUTHORITIES ..... vii

CITATION TO LOWER COURT OPINIONS AND ORDERS ..... 1

STATEMENT OF BASIS FOR JURISDICTION ..... 1

STATUTES INVOLVED IN THE CASE ..... 1

STATEMENT OF THE CASE ..... 2

A. PROCEDURAL HISTORY ..... 3

B. STATEMENT OF FACTS ..... 7

REASONS FOR GRANTING THE WRIT ..... 10

I. THE COURT OF APPEALS INCORRECTLY CHOSE TO APPLY A CALIFORNIA ONE-YEAR STATUTE OF LIMITATIONS TO PETITIONERS' SECTION 510 CLAIM ALTHOUGH IT HAD PREVIOUSLY RECOGNIZED THAT SUCH A SHORT PERIOD FRUSTRATED CONGRESS' BROAD REMEDIAL INTENT IN ERISA ..... 10

A. THE ONE-YEAR STATUTE OF LIMITATIONS DEFEATS ERISA'S REMEDIAL PURPOSES .. 12

B. THE WIDESPREAD CONFLICTS BETWEEN THE CIRCUIT COURTS OF APPEAL ARGUE FOR GRANTING CERTIORARI AND THE ADOPTION OF A UNIFORM STANDARD FOR DETERMINATION OF THE STATUTE OF LIMITATION ..... 15

C. THE NINTH CIRCUIT FAILED TO IMPORT FOR PETITIONERS' CLAIMS CALIFORNIA'S THREE-YEAR LIMITATION FOR STATUTORY WRONGFUL DISCHARGE ACTIONS ..... 20

D. THE THREE YEAR LIMITATIONS UNDER SECTIONS 413(a) AND 4301(f) OF ERISA SHOULD APPLY TO CLAIMS UNDER ERISA SECTION 510 ..... 22

II. RESPONDENTS WAIVED THE STATUTE OF LIMITATIONS DEFENSE BY NOT TIMELY RAISING IT ..... 24

CONCLUSION ..... 27

# TABLE OF AUTHORITIES

*Page*

## Cases Cited:

*Agency Holding Corp. v. Malley-Duff & Assoc.*,
483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) . . 21

*Ahnert v. Delco Electronics Corp.*,
982 F.Supp. 1320 (S.D. Ind. 1997) . . . . . 16

*Alexander v. Alexander*,
140 F.R.D. 925 (W.D. S.C. 1956) . . . . . 26

*Anderson v. Conrail*,
1999 U.S. Dist. LEXIS 4787, 14-15
(E.D. Pa. Apr. 7, 1999) . . . . . 18

*Banks v. Chesapeake & Pot. Tel. Co.*,
802 F.2d 1416 (D.C. Cir. 1986) . . . . . 26

*Banks v. Jockey Int'l*,
996 F.Supp. 576 (N.D. Miss. 1998) . . . . . 16

*Bardon v. Land & River Imp. Co.*,
157 U.S. 327, 15 S.Ct. 650, 39 L.Ed. 719 (1895) . . . . . 26

*Barton v. New United Motor Mfg.*,
43 Cal.App.4th 1200 (1996) . . . . . 5, 12, 15, 21

*Bay Area Laundry v. Ferbar Corp.*,
118 S.Ct. 542, 139 L.Ed.2d 553 (1997) . . . . . 23

*Burnett v. N.Y. Cent. R. Co.*,
380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965) . . . 27

*Burrey v. Pac. Gas & Elec. Co.*,
159 F.3d 388 (9th Cir. 1998) . . . . . 15, 21

*Byrd v. MacPapers, Inc.*,
961 F.2d 157 (11th Cir. 1992) . . . . . 16

*Clark v. Coats & Clark, Inc.*,
865 F.2d 1237 (11th Cir.1989) . . . . . 16

*Curtiss-Wright Corp. v. Schoonegongen*,
514 U.S. 73, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995) . . . 23

*Davis v. Bryan*,
810 F.2d 42 (2nd Cir. 1987) . . . . . 26

*DeWitt v. Penn-Del Directory Corp.*,
872 F. Supp. 126 (D. Del. 1994) . . . . . 18

*Felton v. Unisource Corp.*,
940 F.2d 503 (9th Cir. 1990) . . . . . 11-13, 15, 19, 21

*Fort Halifax Packing Co. v. Coyne*,
482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) . . . . . 24

*Franz v. Iolab, Inc., Div. or Subsidiary of Johnson & Johnson, Inc.*,
801 F.Supp. 1537 (E.D. La. 1992) . . . . . 16

*Gavalik v. Continental Can Co.*,
812 F.2d 834 (3rd Cir. 1987) . . . . . 18

*Getz v. Wallace*,
236 Cal.App.3d 212 (1965) ..... 26

*Giuffre v. Delta Air Lines, Inc.*,
746 F.Supp. 238 (D. Mass. 1990) ..... 18

*Hardin v. Straub*,
490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989)
..... 27

*Hayden v. Ford Motor Co.*,
497 F.2d 1292 (6th Cir. 1974) ..... 26

*Heideman v. PFL, Inc.*,
904 F.2d 1262 (8th Cir.), *cert. denied*, 498 U.S. 1026,
111 S.Ct. 676, 112 L.Ed.2d 668 (1991) ..... 17

*Held v. Manufacturer's Hanover Leasing Corp.*,
912 F.2d 1197 (10th Cir. 1990) ..... 16

*Hinton v. Pacific Enterprises*,
5 F.3d 391 (9th Cir.), *cert. denied*, 511 U.S. 1083,
114 S.Ct. 1833, 128 L.Ed.2d 412 (1994) . 5, 11, 15, 19, 21,
25

*Hughes Aircraft Co. v. Jacobson*,
119 S.Ct. 755, 142 L.Ed.2d 28 (1999) ..... 23

*Hughes Development Co. v. Omega Realty Co.*,
951 S.W.2d 615 (Mo. 1997) ..... 17

*Ingersoll-Rand v. McClendon*,
498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) .. 14

*Inter-Modal Rail Employees Ass'n. v. Atchison, Toepka,*
80 F.3d 348 (9th Cir. 1996), *vacated*
520 U.S. 510 (1997) ..... 3, 5, 25

*Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka,*
520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997) .. 1, 2, 6, 19

*Laborers Health & Welfare Trust v.*
*Advanced Lightweight Concrete Co., Inc.,*
484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) ... 23

*Larson v. University Women's Health Pension Plan,*
971 F.Supp. 398 (D. Minn. 1997) ..... 17

*Lerner v. Los Angeles City Bd. of Ed.,*
59 Cal.2d 382 (1963) ..... 21

*Massachusetts Mut. Life. Ins. Co. v. Russell,*
473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 961 (1985) .. 23

*McClure v. Zoecom, Inc.,*
936 F.2d 777 (5th Cir. 1991) ..... 16

*Musick v. Goodyear Tire & Rubber Co., Inc.,*
81 F.3d 136 (11th Cir.), *cert. denied*, 519 U.S. 965,
117 S.Ct. 389, 136 L.Ed.2d 305 (1997) ..... 16

*North Star Steel Co. v. Thomas,*
515 U.S. 29, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995) ... 10, 11, 24

*Peles v. LaBounty,*
90 Cal.App.3d 431 (1979) ..... 21

*Price v. United Parcel Service*,
601 F.Supp. 20 (D. Mass. 1984) ..... 18

*Raleigh v. Westinghouse Elec. Corp.*,
379 Pa. Super. 606, 550 A.2d 1013 (Pa. Super. 1988),
*appeal denied*, 563 A.2d 499 (Pa. 1989) ..... 18

*Reed v. United Transp. Union*,
488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) .. 10,
12, 19, 24

*Sandberg v. KPMG Peat Marwick, LLP*,
111 F.3d 331 (2nd Cir. 1997) ..... 16

*Shaw v. Delta Air Lines, Inc.*,
463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) ... 14

*Sutter v. First Union Nat. Bank of Va., Inc.*,
932 F.Supp. 753 (E.D. Va. 1996) ..... 18

*Teumer v. General Motors Corp.*,
34 F.3d 542 (7th Cir. 1994) ..... 16

*Turner v. Anheuser-Busch, Inc.*,
20 Cal.App.4th 1183 (1992), *on review*,
7 Cal.4th 1238 (1994) ..... 5

*Van Sant v. American Express Co.*,
169 F.2d 355 (1948) ..... 26

*Varity Corp. v. Howe*,
516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)
..... 13, 22

*Zenith Radio Corp. v. Hazeltine Research, Inc.*,
401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) ..... 26

*Zipes v. Trans World Airlines, Inc.*,
455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) .. 25, 26

## Statutes Cited:

28 U.S.C. §1254(1) ..... 1

28 U.S.C. §1291 ..... 10

28 U.S.C. §1331 ..... 10

29 U.S.C. 1113, ERISA §413 ..... 2, 4, 20, 28

29 U.S.C. §1001(b), ERISA §2(b) ..... 13

29 U.S.C. §1113(a)(2), ERISA §502(a) ..... 2, 12, 22, 24

29 U.S.C. §1132, ERISA §502 ..... 13, 23

29 U.S.C. §1132(3), ERISA §502(e) ..... 10

29 U.S.C. §1140, ERISA §510 ... 1, 2, 4-6, 8, 10-12, 14-22, 24, 25, 27

29 U.S.C. §1145, ERISA §515 ..... 23

29 U.S.C. §1392, ERISA §4212 ..... 23

29 U.S.C. §160(b), National Labor Relations Act ..... 11

29 U.S.C. §2101 *et seq.*, WARN Act ..... 11

29 U.S.C. § 1451, ERISA § 4301 . . 2, 12, 20, 22, 23, 24, 28

Ark. Stat. Ann. §16-56-105 (1999) . . . . . 17

California Code of Civil Procedure §337 . . . . . 2, 15

California Code of Civil Procedure §338 . . . . . 2, 4, 21

California Code of Civil Procedure §339 . . . . . 5, 15

California Code of Civil Procedure §340 . . . . . 2, 5, 15

California Code of Civil Procedure §343 . . . . . 5

Iowa Code §614.1 (1999) . . . . . 17

N.D. Cent. Code §28-01-16 (2000) . . . . . 17

R.R.S. Neb. §25-205 (2000) . . . . . 17

R.R.S. Neb. §25-206 (2000) . . . . . 17

Revised Statutes of Missouri §516.120 . . . . . 17

S.D. Codified Laws §15-2-13 (2000) . . . . . 17

S.D. Codified Laws §15-2-15(3)(4) . . . . . 17

## Other Authorities Cited:

Federal Rules of Civil Procedure, Rule 12(b)(6) . . . . . 25

## CITATION TO LOWER COURT OPINIONS AND ORDERS

Neither the court of appeals' nor the district court's decisions in this case were published in any reporting system. The Ninth Circuit's unpublished memorandum decision appears at Appendix I. The previous opinion by this Court in this case was reported at 520 U.S. 510 (1997).

## STATEMENT OF BASIS FOR JURISDICTION

The court of appeals entered its unpublished memorandum decision on January 21, 2000. That court declined Petitioners' request to publish the memorandum. No Petition for Rehearing was filed.

Petitioners proceed on 28 U.S.C. §1254(1) which confers jurisdiction on this Court to review by Writ of Certiorari the judgment of the Ninth Circuit Court of Appeals.

## STATUTES INVOLVED IN THE CASE

29 U.S.C. §1140: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. (ERISA §510).

29 U.S.C. §1113(a)(2): No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of – ... three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. (ERISA §413(a)).

29 U.S.C. §1451(f)(2): An action under this section may not be brought after the later of – ... 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action... (ERISA §4301).

California Code of Civil Procedure §337: Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing ...

California Code of Civil Procedure §338: Within three years: (a) An action upon a liability created by statute, other than a penalty or forfeiture ...: (d) An action for relief on the ground of fraud or mistake....

California Code of Civil Procedure §340: Within one year: ... (3) An action ... for injury to or for the death of one caused by the wrongful act or neglect of another...

## STATEMENT OF THE CASE

This case was previously before the Court and decided in Petitioners' favor on the question whether Section 510 of ERISA prohibited discrimination to interfere with non-vested benefits provided to Petitioners under a multiemployer health and welfare plan. *Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka*, 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997).

Petitioners are former employees of Respondent SANTA FE TERMINAL SERVICES, INC. (SFTS) who were fired and rehired in a calculated plan to strip them of protected benefits. SFTS was a wholly-owned subsidiary of Respondent BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY (BNSF or BURLINGTON or RAILROAD), formerly The Atchison, Topeka & Santa Fe Railway Company (ATSF or SANTA FE or RAILROAD). Petitioners performed loading and unloading work on SANTA FE trains with RAILROAD's equipment within its Los Angeles inter-modal rail terminal. Respondent IN-TERMINAL SERVICES, INC. (ITS) took over the inter-modal work when SFTS and its employees (Petitioners) were terminated by SANTA FE, and ITS rehired Petitioners the next day with no Teamsters health, dental, or vision benefits, reduced vacation and similar benefits, and sharply reduced Teamsters pension contributions. By virtue of its "fire and rehire" decision SANTA FE (and later BURLINGTON) was relieved of the obligation to contribute to the Railroad Retirement Board payments amounting to well over $6,000 per employee every year to fund their RRB benefits. As a result many among Petitioners lost all eligibility for RRB pensions, and the rest will receive far smaller RRB pensions. In its first decision of this case in 1996, see 80 F.3d 348, 351-2, the court of appeals held that the lost RRB benefits were outside the scope of ERISA's coverage as a "governmental plan." Petitioners' point on this subject in their 1996 Petition (No. 96-491) was not accepted for review by the Court's Order of November 27, 1996 which granted certiorari on the point mentioned above.

## A.
## PROCEDURAL HISTORY

Petitioners filed their Complaint on July 17, 1992 less than three years after their unlawful discharge and less than one

year after retaining counsel (E. 275, 433).[1] In Count I they alleged violations of ERISA Section 510 and their contractual right to receive benefits promised by the National Master Freight Agreement (NMFA) and Western States Area Supplemental Agreements (WSASA) between the Teamsters Union and a multitude of employers within the freight industry including SFTS. Count II of the Complaint (injuries under the FELA) is not a subject of this Petition.

At the time of Petitioners' first filing (July 1992 - two years, three and one-half months after the "fire and rehire" violation) the statute of limitations governing an ERISA Section 510 claim arising in California had yet to be decided. Petitioners operated on the premise either that California's three-year limits for statutory actions or fraud actions, California Code of Civil Procedure §338(a) and (d) (hereinafter "CCP") or California's four-year limit for actions upon any contract, obligation or liability founded upon a written instrument, would govern. Respondents apparently agreed because they did not plead any statute of limitations defense. ERISA Section 510 does not contain its own statute of limitation and the ERISA limitation for breaches of fiduciary duty and other violations, Section 413, is limited to actions under Part 4 of Subtitle B of Title I of the Act. Section 510 was enacted within Part 5.

On November 11, 1992 Respondents moved to dismiss the ERISA claims on the basis that Petitioners failed to state a claim for interference with any protected benefits. Respondents did not plead any contention the ERISA claims were or might be time-barred. On March 6, 1993 the district court dismissed the case and Petitioners filed their first appeal (E. 437).

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[1] All citations to the Excerpts of Record before the court of appeals are given as "E."

On September 17, 1993 the Ninth Circuit ruled for the first time that in some (but no means all) Section 510 claims filed in California, the federal courts would import that state's one-year statute of limitation for implied contracts, CCP §340,[2] although in some cases they would import its two-year statute (oral contracts) CCP §339 or its four-year statute (written instrument) CCP §337.[3]

On March 2, 1994 in a letter to the Ninth Circuit, Respondents **first** claimed that these Section 510 claims were barred by a statute of limitation (E. 388). Respondents admitted they had not raised in the district court before appeal any statute of limitations issue (E. 388). In its first decision in this matter, rendered on March 27, 1996 the Ninth Circuit declined to consider the statute of limitations issue as to a Section 510 claim because it had been raised for the first time only on appeal. *Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka*, 80 F.3d 348, 350 n.4 (1996).

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[2] *Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir.), *cert. denied*, 511 U.S. 1083, 114 S.Ct. 1833, 128 L.Ed.2d 412 (1994). The *Hinton* Court held that, where a Section 510 claim filed in California is based on violation of a written agreement, California's four-year period of limitation applied. *Id.* at 394.

[3] When Petitioners filed this case in 1992 California courts had yet to decide "whether the statute of limitations governing a tortious wrongful discharge action was one year (CCP §340) or four years (CCP §343)." *Turner v. Anheuser-Busch, Inc.*, 20 Cal.App.4th 1183, n.1 (1992), *on review*, 7 Cal.4th 1238 (1994). Not until 1996 did California courts finally declare that a one-year statute of limitations applied to a state commonlaw wrongful discharge claim. *Barton v. New United Motor Mfg.*, 43 Cal.App.4th 1200 (1996). Barton noted that up till 1996 "some uncertainty exist[ed] as to what statute of limitations governs a wrongful termination claim." *Id.* at 1205. The *Barton* court pointed out that the California Supreme Court had yet to rule on that issue. *Id.* at n.2. To this date, it still has not.

After that decision Petitioners sought certiorari in the Supreme Court on three questions, including whether they had stated a claim under Section 510 for Respondents' interference with their non-pension benefits governed by the written collective bargaining agreements (CBA). The Court granted certiorari on that issue only on November 27, 1996. Its unanimous opinion on May 12, 1997 upheld the Section 510 cause of action, vacated the court of appeals' opinion, and remanded. 520 U.S. 510 (1997). The Court did not address the statute of limitations issue.

Respondents **first moved** after remand from this Court to dismiss the ERISA Seetion 510 claims as time-barred on November 21, 1997 (E. 445-46). Petitioners responded that the district court should not retroactively apply the Ninth Circuit's 1993 *Hinton* ruling. The district court granted Respondents' motion, but followed the holding of the *Hinton* court to give Petitioners leave to amend their Complaint "to establish that the employment contract was written rather than oral" and thus fall under California's four-year limitations for actions founded on a written instrument (E. 36). Petitioners filed their Second Amended Complaint pleading that their ERISA claims were based on specific obligations founded on the written CBAs (E. 6-28).

Respondents then moved for a second time after remand to dismiss the ERISA claims on the basis of the one-year personal injury statute. On April 16, 1998 the district court adjudicated the merits of that motion by denying it. The district court also reaffirmed its earlier ruling that California's four-year statute for written instruments governed the ERISA claims under the analysis of *Hinton* (E. 101). In its March 16, 1998 "tentative ruling," later adopted by the district court, the district court ruled that Petitioners' Section 510 claim "falls under the

ambit of California's four-year statute of limitations for written contract cases" (E. 90).

Respondents later in 1998 moved for summary judgment against the ERISA claims on numerous grounds including the time bar of the California personal injury limitation. On December 18, 1998 the district court granted summary judgment, finding the ERISA claims were not founded on the written CBA agreements but were governed by the one-year statute (E. 398). Petitioners promptly moved for reconsideration and heavily argued waiver or equitable estoppel, but the district court stood by its summary judgment on January 22, 1999 (E. 418).

## B.

## STATEMENT OF FACTS

The facts pertinent to Respondents' statute of limitations defense are undisputed. Petitioners were employed by SFTS within the RAILROAD's yard owned and operated by BURLINGTON's predecessor, but received their paychecks from SANTA FE and enjoyed "Railroad" employee status with FELA coverage and RRB benefits. Petitioners were employed under written CBAs which governed every aspect of the terms, conditions and benefits of their employment (E. 278-374). Those CBAs would not expire until at the earliest one year after the wrongful "fire and hire" discharge (E. 278, 336), and in the interim could only be changed through bargaining at the level of the multiemployer bargaining. Petitioners alleged that there had long existed a normal practice and custom of SFTS routinely extending the CBAs with the Teamsters Union for additional multi-year periods (E. 15-6).

The Teamsters' National Master Freight Agreement (NMFA) covered any change of operations by Appellants' employer (or any other signatory employer), all subcontracting of work covered by the agreement, cancellation of the agreement, transfers of employees, and discharge of employees (E.294, 301-03, 321-22, 331-2). The NMFA also proscribed "any ... discriminatory acts prohibited by law" (E. 332).

The Western States Supplemental CBA (WSASA) required Appellants' employer to contribute $322.84 per month per employee to the Teamsters Health and Welfare benefit fund, and defined employee eligibility for health and welfare benefits (E. 352). As of April 1, 1988, the WSASA required employers to contribute $1.83 per employee per hour worked to the Teamsters Pension Trust Fund (E. 354). Pursuant to the contract (E. 354), that pension contribution level to be increased to $1.93 per employee per hour worked on April 1, 1990, the day after Petitioners' mass discharge (E. 392-93). The WSASA covered "disputes" over pension contributions (E. 354). The WSASA also set out the criteria for generous ERISA-protected paid holidays and paid vacations and personal days (E. 349, 351).

On March 31, 1990 Petitioners were discharged from their employment with ATSF and SFTS (E. 375). They alleged a conspiracy to discharge them and thus to interfere with their contractually-based employment for the purpose of stripping away or reducing their contractually-set benefits (E. 22). This discharge violated their rights under ERISA Section 510 to be free of adverse employment actions which interfered with or discriminated against or retaliated against their exercise of their protected employment benefits (E. 22-3). On April 1, 1990 ITS rehired Petitioners to perform the same work that they had done for the RAILROAD in the same railyard and with the same ATSF equipment. Every aspect of

Petitioners' re-employment with ITS at the ATSF railyard in March and April 1990, including the health and welfare and pension contributions and the previously generous vacation pay provisions now lost was precisely governed by a written contract of employment (E. 376). ITS reduced the amount of pension contributions and suspended their health, dental and vision insurance and reduced other welfare benefits that the Petitioners were to have received under the unexpired contracts between SFTS and the Teamsters Union.

Those reductions of ERISA-covered benefits were set out in a new ITS-Teamster contract dated April 1, 1990 (E. 376). The ITS contract provided no health and welfare contributions by ITS (and no health, dental or vision coverage for these employees) for the period April 1 through September 30, 1990. After October 1 the successor employer would begin a vastly scaled back health and welfare contribution, but that would support only limited health insurance without many of the benefits before provided (E. 381, 392-3). The ITS contract rolled back the pension contribution from the contractual increase scheduled to go into effect the day after discharge (E. 383). The ITS contract on its face reduced vacation pay for "SFTSI employees who, as of the date of execution of this Agreement, were entitled to" five weeks paid vacation to three weeks and for "SFTSI employees, who as of the date of execution of this Agreement, were entitled to" four weeks of paid vacation to two weeks (E. 381). But no employee received the expected vacation pay from ITS throughout the remaining nine months of 1990 (E. 255-56).

Petitioners after a diligent, lengthy search and organization for fund-raising retained the undersigned counsel only on December 11, 1991 to represent them in their claims against Respondents (E. 275). None of Petitioners is an attorney. Rather, all were working members of the Teamsters

Union unfamiliar with the intricacies of ERISA or the California law of limitation of actions (E. 275). Their complaint was filed on July 17, 1992 (E. 433).

Federal court jurisdiction was founded on 28 U.S.C. §1331 pursuant to ERISA Section 502(e), 29 U.S.C. §1132(e). Under 28 U.S.C. §1291, the Ninth Circuit had appellate jurisdiction over the district court's order granting summary judgment on the ground of statute of limitations.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT OF APPEALS INCORRECTLY CHOSE TO APPLY A CALIFORNIA ONE-YEAR STATUTE OF LIMITATIONS TO PETITIONERS' SECTION 510 CLAIM ALTHOUGH IT HAD PREVIOUSLY RECOGNIZED THAT SUCH A SHORT PERIOD FRUSTRATED CONGRESS' BROAD REMEDIAL INTENT IN ERISA

When a federal statute does not provide its own limitations period a court generally applies the "state statute 'most closely analogous' to the federal Act in need." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995). In doing so the analogizing court has a "duty," *Reed v. United Transp. Union*, 488 U.S. 319, 324, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989), to prevent the importation of state limitation periods which undermine ERISA's national policies.

To this end a court will apply a federal statute of limitations "when the state limitations periods with any claim of relevance would 'frustrate or interfere with the implementation of national policies,' or be 'at odds with the purpose or operation of federal substantive law.'" *North Star Steel Co. v. Thomas*, 515 U.S. at 34. The federal limitations must come from an "analogous federal law, more in harmony with the objectives of the immediate cause of action." *Id.*

In *North Star Steel*, a claim under the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101 *et seq.*, for the employer's failure to give the required notice of closure of one plant, this Court applied a longer limitation under Pennsylvania law rather than the six-month statute for unfair labor practice claims under the National Labor Relations Act (NLRA), 29 U.S.C. §160(b). Because it was unnecessary to choose any one analogy, the Court held that either Pennsylvania's two-year statute for enforcing civil penalties, its three-year statute for wage claims, its four-year statute for breach of implied contracts, or its six-year residual statute of limitations would be proper and would not frustrate federal policy under WARN. 515 U.S. at 35-6.

Here, the Ninth Circuit ruled that the California claim most analogous to Petitioners' ERISA Section 510 claims was a new, long post-filing one for wrongful discharge under commonlaw. This ruling purported to follow but effectively repudiated its prior decision(s) in *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (9th Cir. 1990)[4] and *Hinton v. Pacific*

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[4] *Felton* arose in Arizona. The employer argued that since Section 510 of ERISA is a statutory action the Ninth Circuit should apply Arizona's one-year limitations for statutory claims. The Ninth Circuit rejected that argument and held that the Section 510 claim was most analogous to a state law wrongful termination suit. 940 F.2d at 512. The court of appeals found, in the absence of a state court decision, that

*Enterprises*, 5 F.3d 391. The Ninth Circuit in this case relied upon a 1996 decision in which a California court first held that its one-year general personal injury statute of limitations applied to common-law wrongful discharge claims. *See Barton*, 43 Cal.App.4th at 1209. The Ninth Circuit thus held in 1999 that Petitioners' Section 510 claims were time-barred when filed in 1992 by virtue of a 1996 state court decision interpreting state commonlaw. That ruling did violence to the Congressional purpose and the national policy that ERISA has broad remedial purposes. It also conflicted with other circuit courts of appeal.

## A.

## THE ONE-YEAR STATUTE OF LIMITATIONS DEFEATS ERISA'S REMEDIAL PURPOSES

The Ninth Circuit's application of California's one-year personal injury statute to Petitioners' Section 510 claims severely frustrates and defeats Congress' broad remedial purpose behind ERISA. In looking at the Arizona statutes of

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Arizona's two-year limitations for personal injury actions would apply to wrongful termination suits. *Id.* The *Felton* court held that applying **a one-year** limitation to a Section 510 claim "'would interfere with the strong federal policy that underlies ERISA.' This is particularly true in light of the three- and six-year limitations periods provided in other parts of ERISA. 29 U.S.C. §§1113, 1451." *Id.* at 513 (emphasis supplied). *Felton* cited the "duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies" imposed by the Court in *Reed v. United Transp. Union*, 488 U.S. 319, 324, 109 S.Ct. 621, 625, 102 L.Ed.2d 665. Petitioners submit that this previously sound reasoning of the Ninth Circuit should guide the Court in choosing a federal three-year limitation period for all Section 510 claims, no matter in which states they might arise.

limitations in *Felton*, 940 F.2d at 513, the court of appeals earlier had found this to be true. The Court as a practical matter is effectively compelled to grant certiorari and reverse the Ninth Circuit's adoption of a one-year limitation.

In Section 2(b) of ERISA Congress declared that "[i]t is ... the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1001(b).

This Court recognized, in *Varity Corp. v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), that Congress intended ERISA to "'provide both the Secretary and participants and beneficiaries with *broad remedies* for redressing or preventing violations of [ERISA].'" *Id.* at 512 (emphasis added). The Court found that the remedial statute in ERISA, Section 502, 29 U.S.C. §1132, provided "'catchall' provisions [which] act as a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." *Id.* Justice Breyer, writing for the majority, posed a series of magisterial questions focusing on why and how the Court could never find, in light of the legislative history and the language of the statute, that Congress intended to deny to employees a remedy for employers' actions that wrongfully deprive them of benefits or to restrict their access to justice. *Id.* at 511-12. The Court found that no denial of ERISA's remedies was among the Congressional purposes underlying its enactment. "We are not aware of any ERISA-related purpose that denial of a remedy would serve." *Id.* at 515. What the court of appeals consciously did here, however, was to deny Petitioners a

remedy based on an improperly analogized state decision rendered four years after the filing of their Complaint and adopted six years after.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the Court described ERISA as "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." In *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 137, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), the Court noted that ERISA "'sets various **uniform standards,** including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans.' As part of this **closely integrated regulatory system** Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.' **Prominent among these safeguards** are three provisions of particular relevance to this case: ... §510, which proscribes interference with rights protected by ERISA" (emphasis added, citations omitted). The Court in *Ingersoll-Rand* went on to note the importance to Congress of Section 510: "Congress viewed this section as a **crucial** part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Id.* at 143 (emphasis added, citations omitted).

It hardly serves Congress' purpose and design to adopt a one-year statute of limitation for this important provision of ERISA. No tenable ground exists to hold that Congress intended to deny access to justice by such a short statute of limitations. Petitioners argued below to no avail that a one-year statute interfered with Congress' remedial purpose behind ERISA.

## B.

## THE WIDESPREAD CONFLICTS BETWEEN THE CIRCUIT COURTS OF APPEAL ARGUE FOR GRANTING CERTIORARI AND THE ADOPTION OF A UNIFORM STANDARD FOR DETERMINATION OF THE STATUTE OF LIMITATION

The circuit courts of appeals differ widely among each other and within themselves on what state statutes of limitation should be analogized to ERISA Section 510 actions.[5] Their record reveals that they find no ready analogies to Section 510, and that their difficulty in analogizing leads to an unpredictable, chaotic patchwork of limitations which often works at cross purposes to the national policy.

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[5] In considering Arizona law on this question first, the Ninth Circuit analogized to what it thought would be a **two-year** statute of limitation for a wrongful termination suit in *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991). When the Ninth Circuit first turned to California law in 1993 it turned to contractual limitations and analogized to either a **one-year** statute of limitation (CCP §340), a **two-year** period (CCP §339), or a **four-year** statute for cases where employment was under a written contract (CCP §337). *Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir.), *cert. denied*, 511 U.S. 1083, 114 S.Ct. 1833, 128 L.Ed.2d 412 (1994). Not until its *Burrey v. Pac. Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998) decision, a few months before the summary judgment against Petitioners, did the Ninth Circuit opt for a **one-year** limit. The one-year limit of *Burrey* is derived from a 1996 California appellate decision which fixed the time applicable *only* to commonlaw wrongful discharge actions. Its focus was on the "personal" nature of the rights invaded, not on any national policy. *See Barton v. New United Motor Mfg.*, 43 Cal.App.4th 1200. The issue of the limitation period for commonlaw actions has yet to be resolved by the California Supreme Court.

In contrast to the Ninth Circuit's recent utilization of California's new commonlaw discharge limitation, the Eleventh Circuit applies either a state's limitation for wage claims or its limitation for statutory actions, but with wildly inconsistent results.[6] The Fifth and Seventh Circuits apply wrongful discharge statutes of limitations to Section 510 claims, although the length of that period varies greatly by state.[7] The Second Circuit adopted New York's two-year limitation applicable to termination in retaliation against receiving workers' compensation benefits. But the Tenth Circuit adopted an entirely different analogy to New York law,[8] and found that

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[6] *See Musick v. Goodyear Tire & Rubber Co., Inc.*, 81 F.3d 136, 139 (11th Cir. 1996), *cert. denied*, 519 U.S. 965, 117 S.Ct. 389, 136 L.Ed.2d 305 (1997) (Alabama's **two-year** wage claim limitations or Alabama's **two-year** retaliatory discharge limitation) and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989) (applying either Georgia's **two-year** wage claim limitations **or its 20-year** statutory claim limitations). *But see Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992) (Florida's **four-year** limitations for suits founded upon statutory liability applied instead of its two-year wage claim limitations).

[7] *See Teumer v. General Motors Corp.*, 34 F.3d 542, 549 (7th Cir. 1994) (Illinois' **five-year** limitation for retaliatory discharge); *Ahnert v. Delco Electronics Corp.*, 982 F.Supp. 1320, 1323 (S.D. Ind. 1997) (Indiana's **two-year** limitation for retaliatory discharge); *McClure v. Zoecom, Inc.*, 936 F.2d 777, 778 (5th Cir. 1991) (Texas' **two-year** wrongful discharge and employment discrimination limitation); *Banks v. Jockey Int'l*, 996 F.Supp. 576, 579 (N.D. Miss. 1998) (Mississippi's **three-year** "catch-all" statute of limitations for wrongful termination); and *Franz v. Iolab, Inc., Div. or Subsidiary of Johnson & Johnson, Inc.*, 801 F.Supp. 1537, 1544 (E.D. La. 1992) (Louisiana's **one-year** limitation for wrongful discharge).

[8] *See Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 337 (2nd Cir. 1997). By contrast, the Tenth Circuit, interpreting New York law, held that New York's **six-year** limitation period for breach of contract actions applied to a Section 510 claim for recovery of pension benefits or for damages, while a **three-year** limitation applied to a Section 510 claim for injunctive relief on an analogy to employment discrimination. *Held v.*

New York provided a six-year period. The opinion of the Second Circuit is especially instructive in depicting that court's agony over the complexity of the choices. The Eighth Circuit has applied the arising state's six-year breach of contract limitation period.[9] But this test can produce a wide variety of results within the same circuit.[10] The Third Circuit has analogized a claim under Section 510 to a claim of employment

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*Manufacturer's Hanover Leasing Corp.*, 912 F.2d 1197, 1207 (10th Cir. 1990).

[9] *See Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir.), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991). If the Ninth Circuit had applied this test here, Petitioners would have enjoyed a four-year limitation period under California's statute for obligations founded on a written instrument. CCP §337. This was good law in the Ninth Circuit until 1998. *Hinton v. Pacific Enterprises*, 5 F.3d 391, 394.

[10] *Larson v. University Women's Health Pension Plan*, 971 F.Supp. 398, 400 (D. Minn. 1997) (Minnesota's **two-year** limitations for wage claims applied to a Section 510 claim). Ark. Stat. Ann. §16-56-105 (1999) (Arkansas' **three-year** limitations on actions on contract). Iowa Code §614.1 (1999) (Iowa's **five-year** limitations on actions on unwritten contracts, **ten-year** limitations on actions on written contracts, and **two-year** limitations on wage claims). R.R.S. Neb. §25-205 (2000) (Nebraska's **five-year** limitation on actions on written contracts). R.R.S. Neb. §25-206 (2000) (Nebraska's **four-year** limitation on actions on oral contracts or statutory liability). N.D. Cent. Code §28-01-16 (2000) (North Dakota's **six-year** limitation on actions on contracts). S.D. Codified Laws §15-2-13 (2000) (South Dakota's **six-year** limitation on actions on contracts). S.D. Codified Laws §15-2-15(3)(4) (South Dakota's **two-year** limitation on actions for wages). §516.120 R.S.Mo. (1999) (Missouri's **five-year** limitations on actions on contract). *See*, however, Section 516.110(1), Missouri's **ten-year** limitation on actions on written contracts to pay money. Held applicable to actions for breach of a written employment contract. *Hughes Development Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. 1997).

discrimination or breach of fiduciary duty.[11] Other circuit courts of appeals, as best we can determine, have not decided this issue, although their district courts have reached widely varying decisions both as to statutes they analogize to Section 510 actions and as to periods of time.[12]

Because twenty-eight years after passage of ERISA the lower courts are still struggling with this issue, and because the circuit courts of appeal reach widely divergent results in their searches for analogous state statutes – not only among themselves but even as to the various states within their respective ambits – a chaotic situation has emerged which may become even worse. This situation cries out for clarity and certainty before it becomes bedlam. The Court should grant certiorari to clarify the proper statute of limitations applicable to Section 510 claims, or at the least to refine its guidance to the lower courts for their analogizing.

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[11] *Gavalik v. Continental Can Co.*, 812 F.2d 834, 843 (3rd Cir. 1987) (applying **six-year** limitations applicable at that time to cases of employment discrimination or breach of fiduciary duty). *But see, Anderson v. Conrail*, 1999 U.S. Dist. LEXIS 4787, 14-15 (E.D. Pa. Apr. 7, 1999) (applying Pennsylvania Superior Court decision post-*Gavalik* that wrongful discharge was an action in tort with a **two-year** limitation. *Raleigh v. Westinghouse Elec. Corp.*, 379 Pa. Super. 606, 550 A.2d 1013, 1014 (Pa. Super. 1988), *appeal denied*, 563 A.2d 499 (Pa. 1989). Analogy to Delaware's "catch-all" statute has led to a **three-year** limitation. *DeWitt v. Penn-Del Directory Corp.*, 872 F. Supp. 126, 134 (D. Del. 1994).

[12] *See Giuffre v. Delta Air Lines, Inc.*, 746 F.Supp. 238, 241 (D. Mass. 1990) (Massachusetts **three-year** tort statute); *Price v. United Parcel Service, Inc.*, 601 F.Supp. 20, 23 n.1 (D. Mass. 1984) (Massachusetts **six-year** limitation applied under analogy to breach of contract claims alleging bad faith); and *Sutter v. First Union Nat. Bank of Va., Inc.*, 932 F.Supp. 753, 757 (E.D. Va. 1996) (Virginia's **one-year** "catch-all" statute covering wrongful discharge claims applied).

The injustice to these Petitioners is the product of the Ninth Circuit's inability to follow its own earlier decisions[13] which drew their inspiration from the "duty" this Court imposed in *Reed v. United Transp. Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) and its predecessors to analogize to state limitation statutes so as to promote the national policy and to effectuate the Congressional intent. The Ninth Circuit's evident desire for clarity, simplicity and predictability has led it to ignore the "duty" imposed by this Court in *Reed*, to avoid the importation of unsuitable state laws, and has caused it to abandon its previous holdings in *Felton v. Unisource Corp.*, *supra*, and *Hinton v. Pacific Enterprises, supra*, which gave some consideration to a role in the exposition of national policy.

Petitioners contend that the need for clarity, simplicity and predictability is evident. They further contend that the need for uniformity has become clear after this long-running welter of confusion. Under the present state of the jurisprudence the situation is poised to become a national nightmare. This potential is highlighted by the conflict mentioned above between the Second and Tenth Circuits about which New York state statute to analogize to and the divergences among the states within the Eleventh Circuit discussed above at n 6. Meanwhile, if this Court does not impose some national authority in our largest state, these complex suits so important to "make promises credible" in the words of Justice O'Connor speaking for the *Inter-Modal* Court, 520 U.S. 515, will continue to be analogized to personal injury and commonlaw discharge actions and barred if not filed within one year.

Giving victimized employees such as Petitioners only one year to find and retain counsel suitable for a Section 510

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[13] *See* footnote 4 *supra*.

action, and for that counsel to conduct an adequate prefiling inquiry, will inevitably deny access to justice to many if not most of them. The undermining of the Congressional intent and the national policy embodied in ERISA is apparent.

ERISA applies to all qualified plans from coast to coast uniformly in all respects except the key component of enforcement. Three-year limitation periods abound in other ERISA enforcement actions which cover virtually all other beneficiaries' rights created by the Act. In actions under Sections 413 or 4301(f) there is no need to analogize, and counsel need not guess about when they must file. Both are sufficiently long enough to permit unsophisticated clients to locate and make arrangements to retain counsel and for the trial bar time to properly meet its need for adequate prefiling inquiry and to acquire technical mastery of what still remains new material for many. The obvious difficulties of analogization have shown why the only suitable analogy must be to a federal statute readily determined by all and consistent with the Congressional purpose in enacting ERISA.

## C.

## THE NINTH CIRCUIT FAILED TO IMPORT FOR PETITIONERS' CLAIMS CALIFORNIA'S THREE-YEAR LIMITATION FOR STATUTORY WRONGFUL DISCHARGE ACTIONS

Petitioners argued below that California's three-year limitation for statutory wrongful discharge claims was most closely analogous and should apply to their Section 510 claims.

Following a recent Ninth Circuit decision,[14] the court of appeals rejected this argument and applied in overbroad fashion the 1996 intermediate appellate decision in *Barton v. New Motor Mfg.*, 43 Cal.App.4th 1200, 1209, holding that California's one-year personal injury limitation applied to commonlaw wrongful discharge claims.

This Court has instructed the lower courts that when choosing the proper state limitations to apply to a federal claim, courts should "'borrow' the **most suitable** statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the **most closely analogous** statute of limitations under state law." *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 146, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (emphasis added). This suggestion was originally followed by the Ninth Circuit in *Felton* (1991) and *Hinton* (1993) but disregarded here and in its *Burrey* (1998) decision.

Petitioners submit that California's most analogous action to Section 510 of ERISA is that for statutory wrongful discharge. In such claims, California holds that the three-year limitation in CCP §338(a) applies. *See Lerner v. Los Angeles City Bd. of Ed.*, 59 Cal.2d 382, 389 (1963) and *Peles v. LaBounty*, 90 Cal.App.3d 431, 435 (1979). Indeed, the *Barton* decision relied upon by the Ninth Circuit here noted that the three-year limitation in CCP §338(a) could apply to a wrongful discharge claim "where the liability is embodied in a statutory provision and is of a type that did not exist at common law." 43 Cal.App.4th at 1209 n.6. The Section 510 claim for interference with statutorily protected rights appears not to have

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[14] *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998), appears to now be accepted by the Ninth Circuit as mandating a one-year limitation in every Section 510 case arising in California.

existed at commonlaw, but was a creation of Congress. Analogizing it to a commonlaw action when an appropriate analogy was at hand which carried a limitation period identical to that provided elsewhere in ERISA was patently wrongheaded, and perhaps best understood as a reflection of the Ninth Circuit's frustration with the analogy process and its appreciation of the need for certainty.

## D.

## THE THREE YEAR LIMITATIONS UNDER SECTIONS 413(a) AND 4301(f) OF ERISA SHOULD APPLY TO CLAIMS UNDER ERISA SECTION 510

Instead of leaving the statute of limitations governing Section 510 claims to the chance of analogies from where the claim arose, or even in what circuit or district the case is litigated, Petitioners urge that the Court accept this case (once again), this time as the vehicle to adopt a uniform federal three-year limitation. The source of this uniform limitation is either of two other sections of ERISA, Section 413(a), 29 U.S.C. §1113(a)(2) which governs fiduciary breaches and other violations of Part 4 of Subtitle B of Title I of the Act, or Section 4301, 29 U.S.C. §1451(f), governing suits on multiemployer plans. A single federal limitation of three years will achieve Congress' main purposes behind ERISA – uniform regulation and the protection of the right to employment benefits – by providing a reasonable, fixed and widely recognized period of time to seek federal remedies.[15]

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[15] ERISA claims for breach of fiduciary duty may be quite similar to Petitioners' Section 510 claims, *see Varity*, 516 U.S. 489.

As ERISA "is a 'comprehensive and reticulated statute,' and is 'enormously complex and detailed,' it should not be supplemented..." with state law doctrines, *Hughes Aircraft Co. v. Jacobson*, 119 S.Ct. 755, 764, 142 L.Ed.2d 28 (1999), such as very short state statutes of limitation which provide no uniform means of regulating conduct. Hence, rather than attempting to refine the process of analogy to find a state statute of limitations to import, which still will produce differing results according to the chosen jurisdiction, the Court should adopt a uniform federal limitation period. This is especially so in light of "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute,'" behind which lies the "purpose to protect contractually defined benefits." *Massachusetts Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 146-8, 105 S.Ct. 3085, 87 L.Ed.2d 961 (1985).

There can be little doubt that the provisions governing multiemployer plans, such as the plans involved in this case, in Title IV of ERISA, are interlocked with the provisions of Title I, protecting employee benefit rights. *See, for example, Curtiss-Wright Corp. v. Schoonegongen*, 514 U.S. 73, 80, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995) (noting that the plan amendment provisions in Section 402 of ERISA apply to multiemployer plans) and *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) (discussing the interplay between Sections 502, 515 and 4212 of ERISA). The three-year limitation in ERISA Section 4301(f) provides a close analogy to Petitioners' claim against their former employer, its parent and their successor employer for interference with protected rights under these multiemployer plans. *See Bay Area Laundry v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (determining when Section 4301(f)'s limitations began to run).

Applying a uniform limitation defined by a related provision in ERISA provides a significantly more appropriate vehicle for the interstitial lawmaking required to effectuate ERISA. Moreover, because this Section 510 claim at its core focuses on interference with Petitioners' rights under multiemployer pension and health and welfare plans covering operations by employers throughout the Western United States, adopting a uniform federal limitation would more closely fulfill one of Congress' chief concerns in enacting ERISA – achieving uniform regulation of plans covering interstate commerce. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987).

For those reasons, both Sections 413's and 4301(f)'s three-year limitations are more appropriate to this Section 510 claim than a state statute of limitations applicable to personal injury and commonlaw discharge claims. *See North Star Steel*, 515 U.S. at 35, and *Reed v. United Transp. Union*, 488 U.S. at 324.

## II.

## RESPONDENTS WAIVED THE STATUTE OF LIMITATIONS DEFENSE BY NOT TIMELY RAISING IT

The court of appeals applied to Petitioners the full harshness of its then newly-imported California law limitation without affording them the clear benefits of the corresponding state law on waiver and equitable estoppel. Respondents did not raise their statute of limitations defense in the district court to these 1992 filed claims until after remand from this Court and the court of appeals in 1997. Simply put, neither California law nor the Ninth Circuit's interpretations of ERISA provided the slightest support for such a defense until 1993 or 1994 at

the earliest. Respondents attempted in 1994 to raise this defense on the first appeal, but only after the Ninth Circuit had first suggested that California's one-year or two-year limitations might sometimes apply to Section 510 claims.[16] The court of appeals in 1996 "decline[d] to consider the issue" because it had not been raised below. *Inter-Modal*, 80 F.3d at 350 n.4. But on this second appeal the court of appeals rejected Petitioners' argument that Respondents had waived any limitations defense by failing timely to raise it. It cited only to Rule 12(b)(6), Fed. R. Civ. P. (App. 5a-6a), and likewise swept aside Petitioners' equitable tolling arguments (App. 6a).

The court of appeals holding on the waiver issue appears to conflict with the ruling in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), as does its rejection of equitable tolling. In *Zipes* the district court had approved a settlement of a class action claiming Title VII violations, *id.* at 388, but the court of appeals reversed the settlement because the class representatives were inadequate. *Id.* On remand, for the first time, the employer argued that the claims were time-barred because they had not filed EEOC claims within Title VII's 90-day limitation. *Id.* This Court reversed the ruling that the claims were time-barred on the ground the employer there had not raised the limitations defense until after remand to the district court following the first appeal. The Court in *Zipes* explained its decision:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement **subject to waiver** as well as tolling when equity so requires, we **honor the remedial purpose of the legislation** as a whole without the negating

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[16] *Hinton v. Pacific Enterprises*, 5 F.3d 391.

> the particular purpose of the filing requirement, to give prompt notice to the employer.

*Id.* at 398 (emphasis added). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 332-3, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (waiver of limitations defense by failing to timely raise it until after trial) and *Bardon v. Land & River Imp. Co.*, 157 U.S. 327, 331, 15 S.Ct. 650, 39 L.Ed. 719 (1895) ("alleged limitation was not set up in the answer or the question raised in any way ... in the circuit court, and, if so, comes too late").

The Ninth Circuit's decision not to hold the limitations issue waived by timely failure to plead also conflicts with the Third Circuit's holding in *Van Sant v. American Express Co.*, 169 F.2d 355, 372 (1948), which held that a limitations defense cannot be raised for the first time after appeal and remand.[17] Other Circuits hold that a limitations defense may be waived if it is not "timely" raised, *Banks v. Chesapeake & Pot. Tel. Co.*, 802 F.2d 1416, 1427 (D.C. Cir. 1986), where it is not presented at the "earliest possible moment," *Davis v. Bryan*, 810 F.2d 42, 44 (2nd Cir. 1987), or where it is pleaded only some 30 months after filing and following reliance by plaintiff, *Hayden v. Ford Motor Co.*, 497 F.2d 1292, 1294 (6th Cir. 1974).

Indeed, the California courts hold that failure to raise a statute of limitations defense promptly constitutes a waiver of that defense. *Getz v. Wallace*, 236 Cal.App.3d 212, 213 (1965). In a federal law claim where a state limitations period is

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[17] In *Alexander v. Alexander*, 140 F.R.D. 925, 930 (W.D. S.C. 1956), the court interpreted *Van Sant* as holding "that after remand a plea of the statute of limitations, which had not been plead prior thereto, was waived and defendant's motion so to amend his answer was properly denied."

borrowed, it is axiomatic that the federal courts also apply that state's law on tolling and its waiver rules. *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). Here, of course, the Ninth Circuit gave Petitioners the harshness of an improperly borrowed California statute of limitation without allowing them the benefits of the clearly applicable California waiver and equitable tolling. Either doctrine would plainly have saved Petitioners' case.

Under this Court's precedents, by filing their motion to dismiss on the merits in 1993 without any mention of a statutory time bar, Respondents judicially admitted they had sufficient notice of Petitioners' claims to defend against same. Where the "purposes and policies" underlying a statute are "humane and remedial," such as in ERISA, courts narrow the application of time limitations, especially when a plaintiff has put a defendant on notice of claims with sufficient time to defend. *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 427-8, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). Indeed, although statutes of limitations evince an interest in "prompt resolution of disputes," that interest "always must be balanced against the countervailing interest in allowing valid claims to be determined on their merits." *Hardin*, 490 U.S. at 542 n.10. Applying the proper balance to these Section 510 claims, in light of Congress' broad remedial purpose behind ERISA, it is clear that Respondents had sufficient notice of these claims. That is all any statute of limitation requires. *Burnett*, 380 U.S. at 427-8. The Ninth Circuit's refusal to apply waiver or equitable estoppel was a failure to follow precedents of the Court.

## CONCLUSION

The Court should grant certiorari to correct the injustices presented by this case and to review the Ninth

Circuit's shift away from concern for implementation of a national policy toward elevation of California policy. Petitioners believe the latter is a fair characterization of the court of appeals' insistence on importing into Section 510 a one-year rule for commonlaw wrongful discharge while refusing to import a plainly analogous three-year statute for statutory actions and to apply the California rules on waiver and equitable estoppel. The decision below is emblematic of the uncertainty and inconsistent results which have grown progressively worse over the 28 years since ERISA's passage. If the lower courts are to be required to continue their tortuous searches for analogous statutes of limitation, they must have clear guidance in that process. Less chaotic would be the adoption of a uniform national three-year statute of limitation analogized from ERISA Sections 413(a) and 4301.

Respectfully submitted,

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# APPENDIX

Appendix I — Unpublished Memorandum Decision of the United States Court of Appeals for the Ninth Circuit Filed January 21, 2000 ..... 1a

Appendix II — Order of the United States District Court for the Northern District of California Filed January 22, 1999 ..... 17a

Appendix III — Order of the United States District Court for the Northern District of California Filed December 18, 1998 ..... 20a

Appendix IV — Inter-Modal Rail Employees Ass'n. Membership List ..... 25a

# APPENDIX I — UNPUBLISHED MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## FILED JANUARY 21, 2000

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-55207

D.C. No. CV-92-6623 WJR

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, a non-profit, mutual benefit California Corp.; THOMAS FRANKS, in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; CHARLES JONES, in the alternative, being a director of said association, for himself and as representative of the affected class of persons plaintiff Association; THOMAS MARTIN, in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; HOYT JARRARD; in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; ROBERT STEIN, in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; ROBERT F. JAQUEZ,

*Appendix I*

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware Corp. The Atchison Topeka & Santa Fe Railway Company; SANTA FE TERMINAL SERVICES, INC., a Delaware corp.; SANTA FE PACIFIC CORPORATION; IN-TERMINAL SERVICES, a Division of Mi-Jack Products, an Illinois corp.; MI-JACK PRODUCTS, INC.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding
Argued and Submitted November 3, 1999
Pasadena, California

Before: BROWNING, TASHIMA, Circuit Judges, and
KING, District Judge.*

*Appendix I*

## MEMORANDUM**

Plaintiffs-Appellants ("Appellants")[1] brought this action against various employers ("Appellees") for interference with protected benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and for personal injury under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. The district court granted summary judgment in favor of Appellees on the ERISA claims as being barred by the statute of limitations and dismissed the FELA claims on collateral estoppel grounds.[2] Appellants timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.

## Standard of Review

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[1] Inter-Modal Rail Employees Association was dismissed as a plaintiff for lack of standing.

[2] The district court initially dismissed the complaint for failure to state a claim. On appeal, we affirmed in part the dismissal of the ERISA count and reversed the dismissal of the FELA claims. See Inter-Modal Rail Employees Ass'n v. Atchison Topeka and Santa Fe Ry. Co., 80 F.3d 348 (9th Cir. 1996) ("Inter-Modal I"), *vacated and remanded*, 520 U.S. 510 (1997). The Supreme Court subsequently vacated our decision and remanded the case.

The district court's grant of summary judgment is reviewed de novo. See Robi v. Reed, 173 P.3d 736, 739 (9th Cir.), cert. denied, 120 S.Ct. 375 (1999). The district court's conclusion that a particular statute of limitation applies is a matter of law reviewed de novo. See United States v. Workinger, 90 P.3d 1409, 1412 (9th Cir. 1996). The question of the availability of collateral estoppel is also reviewed de novo. See Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997).

## Discussion[3]

### I. ERISA Claim

Appellants are former employees of Santa Fe Terminal Services, Inc. ("SFTS"), a wholly owned subsidiary of the Burlington Northern and Santa Fe Railway Company (one of whose predecessor railroads was formerly known as the Atchison, Topeka & Santa Fe Railway) ("Santa Fe"). They claim that Appellees violated ERISA § 510 when Santa Fe terminated its contract with SFTS, under which SFTS provided loading and unloading services at Santa Fe's intermodal railyard. SFTS consequently discharged its employees; who were then hired by the firm which was awarded the contract to succeed SFTS.

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[3] Because the facts of this complex case are known to the parties, we do not recite them here, except as necessary to aid understanding of this disposition.

*Appendix I*

ERISA § 510 protects an employee from being discharged to avoid payment of pension or welfare benefits.[4] ERISA does not provide a statute of limitations for an action brought under § 510. When Congress fails to supply an express statute of limitations, "courts apply the most closely analogous statute of limitations under state law," unless the state statute "frustrate[s] or significantly interfere[s] with federal policies." Reed v. United Transp. Union, 488 U.S 319, 323, 327 (1989).

In Burrey v. Pacific Gas & Elec. Co., 159 F.3d 388 (9th Cir. 1998), we adopted the reasoning of Barton v. New United Motor Mfg., Inc., 51 Cal. Rptr. 2d 328 (Ct. App. 1996), and held that the one-year statute of limitations in Cal. Civ. Proc. Code § 340(3), for a tort action for wrongful termination in violation of public policy, applied to the plaintiffs' ERISA § 510 claim. See 159 F.3d at 397. Burrey, however, was decided well after Appellants had commenced their action. Appellants thus argue that the district court erred in applying Burrey retroactively to their case.

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[4] The statute provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

29 U.S.C. §1140 (1999).

*Appendix I*

**A. Timeliness of Defense**

Appellants first contend that Appellees should be equitably estopped from raising the statute of limitations because of their failure to raise it earlier. Appellees acknowledge that they did not raise the statute of limitations in their initial motion to dismiss under Fed. R Civ. P. 12(b)(6). The Federal Rules do not require, however, that a party raise all of its affirmative defenses in a Rule 12(b)(6) motion. See Fed. R. Civ. P. 12(b). Rather, an affirmative defense, such as the statute of limitations, is timely if it is set forth in the answer to the complaint. Fed. R Civ. P. 8(c). Appellees raised the statute of limitations defense in their answer to the complaint. This assertion was timely under the rules; thus, Appellees did not waive the defense and are not estopped from raising it.

**B. Retroactive Application of Burrey**

Appellants contend that Burrey should not be applied retroactively to their case, relying on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Although the "usual rule is that federal cases should be decided in accordance with the law existing at the time of decision," Chevron Oil permits nonretroactive application of a judicial decision in certain circumstances. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987). Appellants' reliance on Chevron Oil, however, is misplaced.

The Supreme Court has limited the use of the Chevron Oil factors to apply a decision prospectively rather than retroactively. In Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993), the Court stated that, "a rule of federal law, once

announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." In Burrey, we applied the one-year statute of limitations to the parties before us. See Burrey, 159 F.3d at 397. Under Harper, therefore, the district court properly applied Burrey retroactively to bar Appellants' ERISA claims on statute of limitation grounds.[5]

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[5] In any event, Chevron Oil itself would foreclose Appellants' argument because there was no clearly established precedent regarding the California statute of limitations for an ERISA §510 claim on which Appellants could have relied at the time they filed their action. See Saint Francis College v. Al-Khazraii, 481 U.S. 604, 608 (1987) (noting that Chevron Oil rejected retroactive application of a one-year statute of limitations because the decision requiring the shorter limitations period "overruled clearly established Circuit precedent on which the complaining party was entitled to rely"). A year before Appellants commenced this action, Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991), noted that this circuit had not yet addressed the question of what statute of limitations applied to an ERISA §510 claim. See id. at 511. We there concluded that the state law claim most analogous to a §510 claim was wrongful termination against public policy or retaliatory discharge and held that the Arizona statute of limitations for wrongful discharge governed the action. See id. at 512. In California, the question of what statute of limitations governed an action for wrongful termination in violation of public policy was not resolved until Barton held that the one-year statute governed. See 51 Cal. Rptr. 2d at 330.

Thus, Appellants' situation is similar to Goodman where the Court affirmed the retroactive application of a statute of limitations because there was no clear precedent on which the petitioners could have relied. See Goodman, 482 U S. at 662-64 (no inequity in applying limitations period to the workers who are charged with knowledge that it was an unsettled question as to how far back from the date of filing their complaint the damages period would reach"). There was no clearly established precedent

**C. Equitable Tolling**

Appellants contend that the statute of limitations should be equitably tolled because, at the time they were discharged by SFTS, the uncertainty in the law prevented them from knowing what statute of limitations would apply to a § 510 claim in California. This argument fails. Not only has it been deemed equitable to apply a statute of limitations retroactively when there was no clear precedent, see, footnote 5, supra, but, "[a]s a general rule, absent some wrongdoing on the part of a defendant, a plaintiff's ignorance of his cause of action ... does not prevent the running of the limitations period." Garabedian v. Skochko, 283 Cal. Rptr. 802, 804 (Ct. App. 1991), quoted in Hinton v. Pacific Enters., 5 F.3d 391, 397 (9th Cir. 1993).

Appellants urge that the limitations period should be tolled at least until they retained counsel in December, 1991. They fail to explain, however, why they waited from March 31, 1990, the date of their discharge, until December, 1991, to retain counsel. The doctrine of equitable tolling is applied sparingly and is "not available to avoid the consequences of one's own negligence." Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998), cert. denied, 119 S.Ct. 1336 (1999). There is no explanation for Appellants' long delay in filing their complaint. Equitable tolling does not apply.

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on which Appellants would be entitled to rely in deciding when to file their action. Like the parties in Goodman, Appellants were charged with knowledge that the applicable statute of limitations "was an unsettled question."

**D. Application of Different Statutes of Limitations**

Appellants urge the application of various other limitations periods found in the California Civil Procedure Code. The three-year statute of limitations for an action based on fraud, Cal. Civ. Proc. Code § 338(d), does not apply because Appellants did not allege a claim for fraud, but for a violation of ERISA. The application of the three-year period for an action upon a liability created by statute, Cal. Civ. Proc. Code § 338(a), was rejected in Felton. See 940 F.2d at 512 ("The conclusion that an ERISA cause of action is most analogous to an [sic] statutory claim because ERISA is a statute reflects circular reasoning.").

The four-year statute of limitations for an action based on a written contract, Cal. Civ. Proc. Code § 337, does not apply, not only because of Burrey, but also because the essence of Appellants' claim is that they were wrongfully discharged, not that their employment contracts were breached. The analysis in Burrey focused on the "essential nature of the action," which was the violation of personal rights. 159 F.3d at 397 (quoting Burrey, 51 Cal. Rptr. 2d at 333); cf. Hinton, 5 F.3d at 394 ("The very essence of Hinton's [§ 510] claim is that she was wrongfully terminated (and thus cut off from benefits), not that the written provisions of the benefits plan were breached by [her employer]."). Thus, the fact that Appellants' employment contract was written

rather than oral does not require application of the four-year limitations period.[6]

The district court correctly gave retroactive effect to Burrey to bar Appellants' ERISA claim on statute of limitation grounds. Its grant of summary judgment in favor of Appellees on the ERISA claim is therefore affirmed.

## II. FELA Claim

Under 45 U.S.C. § 51, a FELA claim can only be brought against a common carrier. A FELA plaintiff must be employed by a common carrier at the time of his or her alleged injuries. Because Appellants did not contest the fact that SFTS is not a common carrier, the dispositive issue on this claim was whether Santa Fe was Appellants' employer under the FELA.

In the related case of Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs. Inc., 826 F.Supp. 326 (C.D. Cal. 1993) (the "WARN case"), however, the district court held that SFTS and Santa Fe were not a single employer for purposes of the Worker Adjustment and Retraining

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[6] Moreover, it would make no difference whether the district court ruled, as Appellants contend that their claims are governed by the four-year statute. We are not bound by the district court's ruling. In any event, the district court merely refused to dismiss the ERISA claim under Rule 12(b)(6) because of the requirement that it accept as true the allegations of the complaint that the claim was based on a written instrument. The court denied Appellees' motion to dismiss because it had already granted Appellants leave to amend their complaint. This is not equivalent to a ruling that the four-year statute applied to their ERISA claim.

Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109. The district court therefore concluded that collateral estoppel barred Appellants' FELA claim.

Collateral estoppel "bars the relitigation of issues actually adjudicated in previous litigation between the same parties." Steen, 106 F.3d at 910 (internal quotations omitted). In order to foreclose relitigation of an issue under collateral estoppel, the moving party must establish that: (1) the issue at stake is identical to the one alleged in the prior action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a critical and necessary part of the judgment in the earlier action. See Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992). Collateral estoppel does not apply if there is any doubt as to whether an issue was actually litigated in the prior action. See Steen, 106 F.3d at 912 (quoting Eureka Fed. Sav. & Loan Ass'n v. American Cas. Co., 873 F.2d 229, 233 (9th Cir. 1989)).

Appellants did not contest that the single-employer issue was actually litigated, nor that it was necessary to the judgment in the WARN case. Therefore, the question is whether the issue at stake here is identical to that in the prior action; that is, is the finding that SFTS and Santa Fe are not a single employer for WARN purposes identical to a finding that Santa Fe is not Appellants' employer for FELA purposes.[7] We conclude that

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[7] Appellants assert that Appellees waived the collateral estoppel defense by litigating the WARN and FELA cases at the same time without objection. Appellees did not waive the collateral estoppel defense, having properly asserted it in their answer to Appellants' complaint.

the issues are not identical; therefore, collateral estoppel does not apply.

In the WARN case, the issue was whether the parent-subsidiary relationship between SFTS and Santa Fe rendered them a single employer within the meaning of WARN. See 896 F.Supp. at 333-34. By contrast, the focus in Appellants' FELA claim is whether Santa Fe was Appellants' employer at the time of Appellants' alleged injuries. The focus in the prior litigation, therefore, was on the relationship between SFTS and Santa Fe. For FELA purposes, however, the question of whether Appellants were employed by Santa Fe does not necessarily turn on the relationship between the two employers, SFTS and Santa Fe, but on the relationship between Appellants and Santa Fe.

In Kelley v. Southern Pac. Co., 419 U.S. 318 (1974), the injured petitioner was nominally employed by a trucking company, a wholly owned subsidiary of a railroad, but he alleged that he was employed by the railroad within the meaning of FELA. See id. at 319-21. The Court stated that there are three methods by which a plaintiff can establish employment with a rail carrier for FELA purposes even while nominally employed by another: (1) the employee was serving as the "borrowed servant" of the rail carrier at the time of injury; (2) the plaintiff was acting for two masters simultaneously; or (3) the plaintiff is a subservant of a company that was in turn a servant of the railroad. See id. at 324.

We consider four factors in determining whether an issue is identical to an issue previously litigated: (1) whether

there is a substantial overlap between the evidence or arguments to be advanced; (2) whether the evidence or arguments involve the application of the same rule of law; (3) whether pretrial preparation and discovery related to the matter in the first action reasonably could be expected to have embraced the matter sought to be presented in the second; and (4) whether the two claims are closely related. See Steen, 106 F.3d at 912 (quoting Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th Cir. 1995), amended on reh'g, 75 F.3d 1391 (9th Cir. 1996)).

All four factors favor Appellants. Single employer status under WARN focuses exclusively on the relationship between the parent and the subsidiary, not on the relationship between the parent and the employees of the subsidiary. In the WARN case, therefore, the court examined factors such as common ownership, common directors and/or officers, de facto control by the parent over the subsidiary, unity of personnel policies, and corporate structure. See 826 F.Supp. at 335-36. Under the first factor, then, the evidence and argument pertaining to Santa Fe's control over SFTS would not necessarily encompass evidence and arguments relating to Santa Fe's control over SFTS's employees. Similarly, regarding the third factor, the pretrial preparation and discovery in the WARN case would not necessarily have addressed the question of Santa Fe's relationship with Appellants because the WARN case focused on the relationship between the two companies.

The second factor favors Appellants because the evidence and argument do not involve the application of the same rule of law as in the WARN case. Single employer status

under WARN examines the parent company's degree of control over the subsidiary. By contrast, the focus of the inquiry for FELA purposes is on the relationship between the railroad and the worker. See Kelly, 419 U.S. at 323 (the standard for the "while employed" clause of FELA is proof of master-servant relationship between plaintiff and defendant railroad); Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1350 (3rd Cir. 1990) (the railroad's control over the employees is the emphasis in determining employer status under FELA).

Appellees argue that Appellants base their claim solely on the second theory of FELA liability, that they were acting for two masters simultaneously, and that the same rule of law therefore applies to both cases. There is no indication in the record, however, that this was Appellants' sole basis for establishing employment under FELA. Rather, the second amended complaint alleges that SFTS was controlled by Santa Fe, that Appellants were considered to be railroad employees, and that their workplace injuries prior to their discharge were handled "as FELA matters." Appellants do not, nor are they required to, identify in their complaint the particular legal theory on which they intend to proceed. See Crull v. Gem Ins. Co. 58 F.3d 1386, 1391 (9th Cir. 1995) ("The pleadings need not identify any particular legal theory under which recovery is sought."); Electrical Constr. & Maintenance Co. v Maeda Pac. Corp., 764 F.2d 619, 622-23 (9th Cir. 1985) ("A party does not need to plead specific legal theories in the complaint, as long as the opposing party receives notice as to what is at issue in the lawsuit."). The other two theories of FELA liability were not addressed in the WARN case.

*Appendix I*

Appellees argue that Appellants do not explain how the rule of law under FELA is different from that under WARN. The burden, however, is not on Appellants to explain the difference, but on Appellees to establish that it is the same. The burden is on the party asserting collateral estoppel to establish that the estopped issue is identical to the issue in the prior action. See Steen, 106 F.3d at 912.

The fourth factor favors Appellants because the claims are based on different events. The WARN claim was predicated on the insufficient notice of the mass layoff, whereas Appellants' FELA claim is based on injuries they allegedly suffered due to exposure to toxic chemicals and loud noises during the course of their employment.

The issue of whether or not SFTS and Santa Fe are a single employer is therefore not the same as the question of whether Santa Fe is Appellants' employer; accordingly, the district court erred in applying collateral estoppel to bar Appellants' FELA claim.

## Conclusion

We **AFFIRM** the district court's grant of summary judgment in favor of Appellees on the ERISA claim. We **REVERSE** the dismissal of the FELA claim and **REMAND** for further proceedings. Each party shall bear his or its own costs on appeal.

# APPENDIX II — ORDER OF THE DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JANUARY 22, 1999

Cause No. CV-92-6623 WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS L. FRANKS, ROBERT F. JAQUEZ, CHARLES I. JONES, TOMMIE MARTIN JR., AND ROBERT STEIN, et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, SANTA FE TERMINAL SERVICES, INC., a Delaware corporation, IN-TERMINAL SERVICES, INC., an Illinois corporation, and MI-JACK PRODUCTS, INC., an Illinois corporation,

Defendants.

## ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DEFENDANTS' MOTION FOR ATTORNEYS' FEES

Plaintiffs' motion for reconsideration of the Court's Order granting defendants' motion for summary judgment came on regularly for hearing before this Court, the Honorable

William J. Rea presiding, on January 4, 1999. Concurrent therewith, the Court also heard the motion for attorneys' fees brought by Defendants The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services pursuant to 28 U.S.C. §1927. Appearing as counsel at the hearing on said motions was Ronald W. Novotny of Hill, Farrer & Burrill LLP for Defendants The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc.; Neil O. Andrus of Jeffer, Mangels, Butler & Marmaro, LLP for Defendants In-Terminal Services, Inc. and Mi-Jack Products, Inc.; and Richard E. Schwartz of the Midwest Center of Law & Justice and James Kropff of Girardi & Keese for plaintiffs Thomas L. Franks, et al.

Satisfactory proof having been made, good cause appearing, and in the interests of justice, the Court hereby Orders as follows:

The Court hereby denies plaintiffs' motion for reconsideration, and defendants' motion for attorneys' fees, for the reasons set forth in its tentative rulings on said motions which are attached hereto.

IT IS SO ORDERED.

DATED: 01/22/99 /s/William J. Rea
UNITED STATES DISTRICT JUDGE

*Appendix II*

Presented By:

HILL, FARRER & BURRILL LLP

By: /s/Ronald W. Novotny
Attorneys for Defendants
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO. AND
SANTA FE TERMINAL SERVICES, INC.

# APPENDIX III — ORDER OF THE DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED DECEMBER 18, 1999

Cause No. CV-92-6623 WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS L. FRANKS, ROBERT F. JAQUEZ, CHARLES I. JONES, TOMMIE MARTIN JR., AND ROBERT STEIN, et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, SANTA FE TERMINAL SERVICES, INC., a Delaware corporation, IN-TERMINAL SERVICES, INC., an Illinois corporation, and MI-JACK PRODUCTS, INC., an Illinois corporation,

Defendants.

## ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The motion for summary judgment filed by Defendant The Burlington Northern and Santa Fe Railway Co., Santa Fe Terminal Services, Inc., In-Terminal Services, Inc. and Mi-Jack

Products, Inc. came on regularly for hearing before this Court, the Honorable William J. Rea presiding, on November 23, 1998. Appearing as counsel for Defendants The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc. was Ronald W. Novotny of Hill, Farrer & Burrill LLP; appearing as counsel for defendants In-Terminal Services, Inc. and Mi-Jack Products, Inc. was Neil O. Andrus of Jeffer, Mangels, Butler & Marmaro, LLP; and appearing as counsel for plaintiffs Thomas L. Franks, et al. were Richard E. Schwartz of the Midwest Center of Law & Justice and James Kropff of Girardi & Keese.

Satisfactory proof having been made, good cause appearing, and in the interests of justice, the Court hereby Orders as follows:

The Court previously rejected Defendants' Motion to Dismiss based on the statute of limitations because Plaintiffs pled that a written employment contract was at issue. Accordingly, the Court did not go beyond the pleadings to determine whether or not the claim was in fact founded in the contracts that were allegedly at issue.

Although Plaintiffs have pled that written employment contracts are at issue, Plaintiffs' pleadings and evidence are not sufficient to defeat summary judgment based on the statute of limitations. To invoke the four-year, contract-based, statute of limitations, "[i]t is not sufficient that the cause of action is in some way remotely or indirectly connected with an instrument in writing or that the instrument is a link in the chain establishing the cause of action. The instrument itself must contain the contract to do the thing for the nonperformance of which the action is sought." Citizens Casualty Company of New York v. Otis Clark & Co., 19 Cal.App.3d 294, 299 (1971).

Furthermore, the Ninth Circuit has recently clarified that "[w]hat is significant for the statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct." Burrey v. Pacific Gas & Electric Co., ___ F.3d ___, 1998 WL 727284 *8 (9th Cir. Oct. 20, 1998).

The primary interest allegedly invaded by Defendants' wrongful conduct is not anything that is founded in the written contracts that Plaintiffs refer to in their Second Amended Complaint. The primary interest that Defendants have allegedly violated relates to the personal rights protected by § 510 of ERISA.

The Burrey case is on point. There the one-year statute of limitations that governs actions brought for wrongful termination in violation of public policy, which is embodied in California Code of Civil Procedure § 340(3), was found to apply to an action under § 510 of ERISA. In Burrey and in the instant case, "the gravamen of the

wrongful termination action is the violation of some personal right considered to be of fundamental public importance, protected or guaranteed either by statute or the Constitution ...." Burrey, 1998 WL 727284 *8 (citing Barton v. New United Motor Mfg., Inc., 43 Cal.App.4th 1200, 1207-09 (1996)).

Since Plaintiffs have not shown that their cause of action is founded in the written contracts related to their employment, the statute of limitations for wrongful termination based on contract is not applicable to their claim. The analogous State cause of action is wrongful termination in violation of public policy which is governed by California Code of Civil Procedure § 340(3). Therefore, the Court finds that Plaintiffs' ERISA claim is subject to a one-year statute of limitations.

Plaintiffs were discharged from their employment with Defendant SFTSI on March 31, 1990. This action was not commenced until July 17, 1992. Therefore, the Court hereby grants Defendants' Motion for Summary Judgment on the ground that Plaintiffs' § 510 ERISA claim is barred by the applicable statute of limitations.

Based on the foregoing, Plaintiffs' Motion for Class Certification is denied on the ground that it is moot.

Plaintiffs may move for reconsideration on this Order no later than December 3, 1998.

*Appendix III*

IT IS SO ORDERED.

DATED: 12/17/98 /s/Judge William J. Rea
UNITED STATES DISTRICT JUDGE

Presented By:

HILL, FARRER & BURRILL LLP

By: /s/Ronald W. Novotny
Attorneys for Defendants
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO. AND
SANTA FE TERMINAL SERVICES, INC.

# APPENDIX IV — INTER-MODAL RAIL EMPLOYEES ASSOCIATION MEMBERSHIP LIST

Thomas L. **FRANKS**
Charles I. **JONES**
Tommie **MARTIN**, Jr.
Hoyt D. **JARRARD**, Sr.
Robert **STEIN**
Robert F. **JAQUEZ**

Elias P. **AGUIRRE**
Martin F. **ALARID**
Keith F. **BAKER**
Robert E. **BAKER**
Jerry D. **BAUER**
Jack P. **BLAKE**
Richard B. **BOYLE**
Danny R. **BREWER**
Phillip E. **BURNS**
Andrew **BYON**
Maria C. **CARDENAZ**
Steve **CLARK**
Carl L. **COOK**
William **CORSO**
Chris L. **COX**
Frank M. **DAVIES, SR.**
Gilbert **DELGADO**
Silviano Sal **DIAZ**
Lloyd C. **EASTERLY**
James E. **ESTES**
Nick **FIGUEROA**
Roy O. **FREASE**
Alfredo R. **FRESQUEZ**
Marguerite **FRYER**
Ralph M. **GARCIA**
Robert B. **GARCIA**
Ralph **GASTELUM**
Robert V. **GIBBS**
Conrad **GOMEZ**
Guadalupe **GONZALES**
Kelsey **GREEN**
Lawrence E. **GREEN**
Robert T. **GULLEY**
John A. **HERNANDEZ**
John D. **KAOPUIKI**
Edward C. **KEMA**
Frank **LAMBERT**
Herbert H. **LEGGINS**
Richard **LOPEZ**
James R. **McCOVERY**
Travis **McDONALD**
Alejandro A. **MEDRANO**
Juan **MODZELEWSKI**
Crespine A. **MOJICA**
Karl **MONTOYA**
Frank **MORALES**, Jr.
Donald E. **NELSON**
Reynaldo **PADUANI**
Danny A. **PARKER**

*Appendix IV*

David J. **PARKER**
Randy R. **PARKER**
Troy J. **PERKINS**
Wesley R. **PIERCE**
Richard A. **PURATY**
Paul J. **QUINTERO**
Bill L. **REES**
Larry D. **RICHEY**
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No. 99-1704

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, ROBERT STEIN, AND ROBERT JAQUEZ,

*Petitioners,*

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CO., formerly known as THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; SANTA FE TERMINAL SERVICES, INC.; IN-TERMINAL SERVICES, INC.; and MI-JACK PRODUCTS, INC.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is review necessary to determine whether claims arising under ERISA §510 should be governed by a federal three-year limitations period borrowed from ERISA §§413(a) and 4301(f) in lieu of the most analogous state-law statute of limitations, notwithstanding the absence of any authority for this contention and Petitioners' failure to even raise it below?

2. Whether certiorari should be granted to determine whether the court of appeals properly applied a one-year California statute of limitations for actions based on wrongful discharge to Petitioners' §510 claim, in the absence of any direct and irreconcilable conflict between the Circuit Courts over what kinds of state-law limitations periods should apply to such claims?

3. Whether review should be granted to determine whether Respondents waived their statute of limitations defense to Petitioners' §510 claim, or whether the applicable limitations period was equitably tolled in this case?

## CORPORATE DISCLOSURE STATEMENT

[Supreme Court Rule 29.6]

Respondents The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc. are the subsidiaries of one parent or publicly-held corporation that owns more than 10% of their stock, Burlington Northern Santa Fe Corp.

Mi-Jack Products, Inc. and In-Terminal Services, Inc. have no parent or publicly-held companies which own more than 10% of the stock of either company.

## LIST OF INTERESTED PARTIES

The parties to this proceeding are correctly identified in the Petition for Writ of Certiorari.

## TABLE OF CONTENTS

Questions Presented ..... i

Corporate Disclosure Statement ..... ii

List of Interested Parties ..... iii

Statement of the Case ..... 1

Reasons for Denying the Writ ..... 5

I. PETITIONERS' ARGUMENT IN FAVOR OF BORROWING A FEDERAL LIMITATIONS PERIOD HAS BEEN WAIVED BECAUSE IT WAS NOT RAISED BELOW AND IS MERITLESS IN ANY EVENT ..... 5

A. Petitioners Have Waived Their Contention That Any Limitations Periods In ERISA Apply to §510 Actions ..... 5

B. The Lower Federal Courts Have Uniformly Rejected A Federal Limitations Period For §510 Claims ..... 7

II. REVIEW IS NOT NECESSARY TO DETERMINE WHETHER THE COURT PROPERLY APPLIED CALIFORNIA'S ONE-YEAR STATUTE OF LIMITATIONS FOR TORTIOUS WRONGFUL DISCHARGE CLAIMS TO PETITIONERS' SECTION 510 ACTION ..... 11

A. There Is No Direct And Irreconcilable Conflict Among The Circuit Courts As to What State Statute Of Limitations To Apply ERISA Section 510 Claims. ..... 11

B. The Ninth Circuit Properly Applied California's One Year Statute Of Limitations For Tortious Wrongful Discharge Claims to Petitioners' Section 510 Claim ..... 17

III. CERTIORARI IS COMPLETELY INAPPROPRIATE TO REVIEW WHETHER RESPONDENTS WAIVED THEIR STATTUTE OF LIMITATIONS DEFENSE OR WHETHER THE LIMITATIONS PERIOD WAS TOLLED .. 21

Conclusion ..... 24

## TABLE OF CITATIONS

**Cases Cited:**

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 152, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) ..8

Anhert v. Delco Electronics Corp., 982 F.Supp. 1320, 1327 (S.D. Ind. 1997).....14, 19

Baradell v. Board of Social Services, 970 F.Supp. 489, 494 (W.D. Va. 1997).....13

Barnett v. International Business Machines Corp., 885 F.Supp. 581, 592 (S.D. N.Y. 1995).....12

Barton v. New United Motors Manufacturing Co., 43 Cal.App.4th 1200, 1209, n.6 (1996).....17, 18, 20

Bollenbacher v. Helena Chemical Co., 934 F.Supp. 1015, 1030 (N.D. Ind. 1996).....12

Borden v. Johnson, 196 Ga. App. 288, 289, 395 S.E.2d 628 (Ga. App. 1990).....15

Burrey v. Pacific Gas & Electric Co., 159 F.3d 388 (9th Cir. 1998).....3, 4, 16, 18, 20

Byrd v. MacPapers, Inc., 961 F.2d 157, 159 (11th Cir. 1992).....15

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-7, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).....4

Clark v. Coates & Clark, Inc., 865 F.2d 1237, 1241 (11th Cir. 1989) ..... 15, 17

Corkery v. SuperX Drugs Corp., 602 F.Supp. 42, 45 (M.D. Fla. 1985) ..... 12

DelCostello v. International Brotherhood of Teamsters, 460 U.S. 151, 172, 103 S.Ct. 22, 81, 76 L.Ed.2d 476 (1983) ... 6, 9

DeWitt v. Penn-Del Directory Corp., 872 F.Supp. 126, 136 (D. Del. 1994) ..... 7

Felton v. Unisource Corp., 940 F.2d 503, 511-12 (9th Cir. 1991) ..... 19

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) ..... 11

Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988). 18

Giuffre v. Delta Airlines, Inc., 746 F. Supp. 238, 241 (D. Mass. 1990) ..... 12

Goodman v. Lukens Steel Co., 482 U.S. 656, 662-4, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) ..... 4

Grupo Mexicano v. Alliance Bond, 527 U.S. ___, 119 S.Ct. ___, 144 L.Ed.2d 319, 330, n. 3 (1999) ..... 6

Gutierrez v. Mofid, 39 Cal.3d 892, 898-99 (1985) ..... 23

Hardin v. Straub, 490 U.S. 536, 538-44, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989) .....23

Harper v. Virginia Department of Taxation, 509 U.S. 86, 96, 113 S. Ct. 2510, 125 L.Ed.2d 74 (1993) .....18

Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327, 1329 (Fla. App. 1985).....15

Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 298 (9th Cir. 1987).....20

Healy Tibbitts Construction Co. v. Insurance Company of North America, 679 F.2d 803, 804 (9th Cir. 1982).....22

Heideman v. PFL, Inc., 904 F.2d 1262, 1267 (8thCir. 1990)13

Heideman v. PFL, Inc., 710 F.Supp. 711, 720, n. 19 (W.D. Mo. 1989).....13

Held v. Manufacturers Hanover Leasing Corp., supra, 912 F.2d at 1200, 1209-10 .....7

Held v. Manufacturers Hanover Leasing Corp., supra, 912 F.2d at 1207 (10th Cir. 1990).....13

Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. den. 511 U.S. 1083 (1994) .....20

Holly Farms Corp. v. NLRB, 517 U.S. 392, 400, n. 7, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996) .....7

Inter-Modal Rail Employees Association v. The Atchison, Topeka & Santa Fe Railway Co., 80 F.2d 348, 351-2 (9th Cir. 1996) ..... 2

Inter-Modal Rail Employees Association v. The Atchison, Topeka & Santa Fe Railway Co., 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997) ..... 3, 11

Jaskilka v. Carpenter Technology Corp., 757 F.Supp. 175, 177 (D.Conn. 1991) ..... 12

Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1109-10 (1988) ... 23

Matsushita Electric Indus. v. Epstein, 516 U.S. 367, 379, n.5, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) ..... 6

McClure v. Zoecon, Inc., 936 F.2d 777, 778, n. 2 (5th Cir. 1991) ..... 7, 12, 13

Musick v. Goodyear Tire & Rubber Co., Inc., 81 F.3d 135, 139, (11th Cir. 1996) ..... 14

North Star Steel Co. v. Thomas, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995) ..... 9, 10, 16, 17

Reed v. United Transportation Union, 488 U.S. 319, 324, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) ..... 5, 9, 10, 17

Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984) ..... 22

Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331, 336 (2d Cir. 1997) ..... 7, 14

Smith v. Piezo Technology Professional Administrators, 427 So.2d 182, 184 (Fla. 1983) ..... 15

St. Francis College v. Al-Khazraji, 481 U.S. 604, 608, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) ..... 4

Sutter v. First Union National Bank of Virginia, Inc., 932 F.Supp. 753, 757 (E.D. Va. 1996) ..... 12

Teumer v. General Motors Corp., 34 F.3d 542, 547, n.1 (7th Cir. 1994) ..... 7, 12

Van Sant v. American Express Co., 169 F.2d 355, 372 (1948) ..... 21

Varity Corp. v. Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ..... 8

Wholesale & Retail Distribution Teamsters v. Santa Fe Terminal Services, 826 F.Supp. 326, 330 (C.D. Cal. 1993). 22

Wilson v. Garcia, 471 U.S. 261, 267-8, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) ..... 8

Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1291 (10th Cir. 1991) ..... 7

Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 332-3, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) ..... 21

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) ..... 21

**Statutes:**

ERISA § 510 ..... i, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23

ERISA §§ 413(a) and 4301(f) ..... i, 5, 7, 8

29 U.S.C. § 1140 ..... 2

45 U.S.C. § 51 ..... 2

California Code of Civil Procedure (C.C.P.) § 340(3) ..... 3, 4, 13, 17, 18, 20

29 U.S.C. §§ 1113(a)(2) and 1451(f)(2) ..... 5

C.C.P. § 337(1) ..... 6

Workers' Adjustment and Retraining Notification ("WARN") Act 29 U.S.C. § 2101, et. seq. ..... 10

Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2) ..... 10

N.Y. Work. Comp. Law § 120 ..... 14

C.C.P. § 338(a) ..... 17, 20

Title VII of the U.S. Civil Rights Act of 1964, 42 U.S.C. §2000e-5(e)(1) ..... 19

**Rules:**

Federal Rule of Civil Procedure 12(b)(6).....2, 21

Rule 7(a).....22

Federal Rule of Civil Procedure 12(h)(2).....22

## STATEMENT OF THE CASE

This action arose out of a change in the employment of Petitioners on March 31, 1990. Until that date, Respondent Santa Fe Terminal Services, Inc. ("SFTSI") was signatory to an agreement with The Atchison, Topeka and Santa Fe Railway Co. (the predecessor to Respondent The Burlington Northern and Santa Fe Railway Co.) to provide loading and unloading of "intermodal" trailers and containers on and off of rail flatcars at the Railway's "Hobart yard" rail terminal in Los Angeles. Petitioners performed that function for SFTSI as members of two labor organizations, Teamsters Local Unions 63 and 208. (See Petition, pp. 9-10).[1]

In early 1990, SFTSI was competitively outbid by Respondent In-Terminal Services, Inc. ("ITS"), for a new service agreement at the terminal. As a consequence, most of Petitioners' members transferred their employment from SFTSI to ITS effective April 1, 1990. Petitioners allege that after they were hired by ITS, they suffered a reduction in contributions to, and benefits from, their Teamster-sponsored multi-employer pension and health and welfare plans as a result of this change in their employer and the negotiation of a new collective bargaining agreement between ITS and Locals 63 and 208. (See Appellant's Excerpts of Record on

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[1]Respondent Santa Fe Railway strongly disputes Petitioners' assertions that they "received their pay checks" from the Railway and enjoyed "Railroad employee status with FELA coverage and RRB [Railroad Retirement Board] benefits." (See Petition, p. 7). Respondent further disputes Petitioners' assertion that they were discharged from their employment with the Railway, because none of them were ever Railway employees. (See Petition, pp. 3 and 8-9).

Appeal, hereinafter "E.R.," at p. 14, ¶ 31).

This action was commenced on July 17, 1992, more than two years after the change in Petitioners' employment. Petitioner's original Complaint alleged three claims for relief, for (1) interference with their rights in violation of § 510 of ERISA, 29 U.S.C. § 1140, (2) personal injuries under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq., and (3) wrongful discharge in violation of public policy. (See Appellees' Supplemental Excerpts of Record on Appeal, hereinafter "S.E.R.," pp. 1-9). The action was brought by the "Inter-Modal Rail Employees Association" (IMREA) as the assignee of the claims brought by Petitioners or, in the alternative, as a class action on their behalf.

In April 1993, the district court granted Respondents' motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), based primarily on the ground that Petitioners had not stated an actionable claim for violation of § 510 of ERISA and could not maintain a class action under FELA.[2] The Ninth Circuit Court of Appeals subsequently upheld the dismissal of Petitioners' § 510 claim to the extent it was based on the alleged interference with their health and welfare and railroad retirement benefits, but held that the district court erred in dismissing their claim for interference with their rights to pension benefits under the statute. Inter-

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[2]The court also dismissed Petitioners' third cause of action for wrongful discharge in violation of public policy because it was not filed within one year as required by Cal. Code of Civ. Proc. § 340(3) -- the same statute of limitations that the court ultimately applied to their ERISA claim. (See S.E.R. 21, 35)

Modal Rail Employees Association v. The Atchison, Topeka & Santa Fe Railway Co., 80 F.3d 348, 351-2 (9th Cir. 1996). On certiorari, this Court held that a claim could be maintained under § 510 for interference with Petitioners' non-vested "health and welfare" benefits, and remanded the case for further proceedings. Inter-Modal Rail Employees Association v. The Atchison, Topeka & Santa Fe Railway Co., 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997).

After remand, Petitioners filed a First Amended Complaint alleging a violation of § 510 of ERISA and personal injuries under FELA.[3] On November 23, 1998, the district court granted Respondents' motion for summary judgment on the § 510 claim on the ground that it was barred by the one-year limitations period contained in California Code of Civil Procedure (C.C.P.) § 340(3). The court specifically concluded that the "primary interest" which was invaded by the Respondents' alleged wrongful conduct was Petitioners' personal interests in not being wrongfully terminated from their employment by SFTSI, and that the one-year statute for tortious wrongful discharge claims was applicable under the Ninth Circuit's decision in Burrey v. Pacific Gas & Electric Co., 159 F.3d 388 (9th Cir. 1998) decided earlier that year. (App. III, 22a). Petitioners thereafter filed a motion for reconsideration of the district court's decision, which was denied. (E.R. 418-26; App. I, 4a-10a).

In its unpublished memorandum decision of January 21, 2000, the Ninth Circuit affirmed summary judgment for

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[3]The district court subsequently dismissed the claims of the "Inter-Modal Rail Employees Association" for lack of standing, thus rendering the Association's inclusion as one of the parties to this petition improper. (See E.R., 30-31).

Respondents on Petitioners' § 510 ERISA claim on the ground that it was not timely filed within the one-year limitations period applicable to § 510 claims in California. The Court of Appeals held that the Burrey case was properly given full retroactive effect to this action, and that the one-year statute of limitations contained in C.C.P. § 340(3) was properly applied to Petitioners' claim because the "essential nature of the action" was to remedy a violation of "personal rights" implicated by § 510. (See Appendix I, 6a-10a).[4] The Ninth Circuit also categorically rejected Petitioners' contentions that Respondents waived their statute of limitations defense, and that the applicable limitations period was equitably tolled in these circumstances. (Id. at 6a, 8a). No petition for rehearing or suggestion for rehearing en banc was filed.

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[4]In holding that Burrey was properly applied to the case at hand, the Court distinguished Chevron Oil Co. v. Huson, 404 U.S. 97, 106-7, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) on the ground that Burrey did not overrule any "clearly established precedent" on which Petitioners were entitled to rely. (See Appendix I, 7a, n. 5, citing St. Francis College v. Al-Khazraji, 481 U.S. 604, 608, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) and Goodman v. Lukens Steel Co., 482 U.S. 656, 662-4, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONERS' ARGUMENT IN FAVOR OF BORROWING A FEDERAL LIMITATIONS PERIOD HAS BEEN WAIVED BECAUSE IT WAS NOT RAISED BELOW AND IS MERITLESS IN ANY EVENT

#### A. Petitioners Have Waived Their Contention That Any Limitations Periods In ERISA Apply to § 510 Actions

The principal argument presented in the certiorari petition is that a uniform federal limitations period should be borrowed from elsewhere in ERISA. Petitioners specifically contend that this Court should grant review and adopt a uniform three-year limitations period to § 510 claims based on §§ 413(a) or 4301(f)(2) of ERISA, 29 U.S.C. §§ 1113(a)(2) and 1451(f)(2). (Petition, p. 23). However, Petitioners did not propose the application of either of these federal statutes to their § 510 claim in the proceedings below, nor did they argue that a federal law limitations period applied to that claim pursuant to the "narrow exception" to borrowing state limitations periods in these circumstances. See Appellees' Joint Answering Brief, p. 13, n. 2 [citing Reed v. United Transportation Union, 488 U.S.

319, 324, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) and DelCostello v. International Brotherhood of Teamsters, 460 U.S. 151, 172, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)]. Rather, Petitioners consistently argued, both in the district court and the appellate court, only that a three or four-year limitations period should be borrowed from state law for application to their § 510 claim in these circumstances, thereby fully conceding the propriety of borrowing a state limitations period.[5] (See Appellants Opening Brief, p. 19 (arguing that the duty of the federal courts under Reed was to "formulate an analogy to the various California causes of action that would avoid the importation into ERISA" of the one-year limitations period applied in this case); Appellants Opening Brief, p. 34 (correctly noting that since ERISA § 510 does not contain its own statute of limitations, litigants such as Petitioners "must look to the most analogous statute of limitations under *state* law"); S.E.R. 148 (in which Petitioners' counsel expressly acknowledged that § 510 is a "public policy type tort claim which borrows the statute of limitations from whatever analogous *state laws* exist in the various jurisdictions").

Because Petitioners failed to raise their federal limitations argument below, they have accordingly waived it and the Court should decline to consider it. See Grupo Mexicano v. Alliance Bond, 527 U.S. ___, 119 S.Ct. ___, 144 L.Ed. 2d 319, 330, n. 3 (1999); Matsushita Electric

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[5]Petitioners no longer contend that the four-year limitations period contained in C.C.P. § 337(1) applied to their claim, nor could they reasonably do so given the utter lack of merit of that contention and the Ninth Circuit's outright rejection of it. (See Appellees' Joint Answering Brief, pp. 23-29; App. I, 9a).

Indus. v. Epstein, 516 U.S. 367, 379, n. 5, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); Holly Farms Corp. v. NLRB, 517 U.S. 392, 400, n. 7, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996).

### B. The Lower Federal Courts Have Uniformly Rejected A Federal Limitations Period For § 510 Claims

Apart from Petitioners' failure to raise their federal limitations period argument at any prior point in these proceedings, this argument has never been accepted by any federal court, anywhere. Every federal court which has considered the proposition that a federal statute of limitations, including §§ 413(a) or 4301 of ERISA, should be applied to § 510 claims has unhesitatingly rejected it. See Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1200, 1209-10 (10th Cir. 1990); McClure v. Zoecon, Inc., 936 F.2d 777, 778, n.2 (5th Cir. 1991); Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331, 336 (2d Cir. 1997)(holding that the "available state-law limitations periods satisfy the federal government's interest in ensuring that an employer fulfill its obligations under ERISA"); Teumer v. General Motors Corp., 34 F.3d 542, 547, n.1 (7th Cir. 1994)(finding no particularly appropriate federal analogue that would "prompt us to part from the usual practice [of borrowing the most applicable state law statute of limitations] in this case"). Some courts have in fact expressly rejected application of the limitations period contained in § 413 to § 510 claims. See Teumer, supra, 34 F.3d at 546; Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1291 (10th Cir. 1991); DeWitt v. Penn-Del Directory Corp., 872 F.Supp. 126, 136 (D. Del. 1994).

There is good reason for this uniform rejection of efforts to borrow limitations periods from other parts of ERISA, because (as Petitioners concede in their Petition) § 413(a) expressly applies only to actions under Title I, Subtitle B, Part 4 of ERISA for breaches of fiduciary duty, and § 4301 expressly governs only actions against multiemployer plans under Subtitle E of Title IV of the statute (See Petition, p. 4).[6] Since no circuit court has ever adopted or even suggested adopting either of the suggested federal analogues to § 510 claims, there is clearly no conflict among the circuits regarding the propriety of doing so. Nor is there any other basis in Supreme Court Rule 10 that would support the grant of certiorari on this issue.

Indeed, this argument runs counter to well established principles of federal law. When Congress fails to provide a statute of limitations for claims arising under federal statutes, a court must generally apply the limitations period of the state-law cause of action most analogous to the federal claim. Wilson v. Garcia, 471 U.S. 261, 267-8, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). This requires the court to "characterize the essence" of the plaintiff's federal claim (Id. at 267-70), and apply the statute which "substantively most resembles the federal action." Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 152, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). Petitioners thus acknowledge that when a federal statutory claim does not

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[6]Moreover, this Court did not acknowledge that § 510 claims are "quite similar" to breach of fiduciary claims in its decision of Varity Corp. v Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), as Petitioners assert; in fact, this Court did not even address § 510 claims in its opinion in that case. (See Petition, p. 22, n. 15).

provide its own limitations period, a court generally applies the "state statute which is 'most closely analogous" to the federal Act in need." See Petition, p. 10, citing North Star Steel Co. v. Thomas, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995). Only when the state limitations rule is "at odds for the purpose of operation of federal substantive law," has the Court recognized a "closely circumscribed exception" from the general rule that statutes of limitation are to be borrowed from state law. Reed, supra, 488 U.S. at 324. Accordingly, resort to state law remains the norm for "borrowing purposes" except

> [w]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making.

DelCostello, supra, 460 U.S. at 171-2; Reed, supra, 488 U.S. at 323-4.

Petitioners have failed to show that the requirements for application of this narrowly circumscribed exception to the general rule of borrowing state limitation periods apply in this case. They have not even begun to explain why any of the suggested provisions of ERISA would constitute a "closer analogy" to § 510 actions than state statutes of limitation applicable to wrongful discharge causes of action which, as shown infra, have been invoked in virtually all states in which such claims exist. Petitioners accordingly attempt to achieve here judicially what Congress did not do

legislatively, and urge the Court to adopt a limitations period in derogation of the usual procedure for finding the most appropriate limitations period in these circumstances. Stated differently, they ask this Court to address an argument that calls for a radical departure from existing law, when it was not raised below and has never been accepted or even considered by the by Ninth Circuit in this case or by any other federal court.[7] For each of these reasons, the Court should deny the petition.

[7]In contrast, in both North Star and Reed, supra, the Court resolved splits in the circuit courts over whether statutes of limitations applicable to various federal statutory claims should be borrowed from state or federal law. See North Star, supra, 515 U.S. at 33 (resolving conflict between circuits in borrowing state-law or National Labor Relations Act (NLRA) limitations periods to actions brought under the Workers' Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101, et. seq.; Reed, supra, 488 U.S. at 323, n.3 (resolving conflict between circuits as to whether the NLRA or state-law limitations periods applied to claims brought by union members under the free speech and assembly provisions of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2). Significantly, the Supreme Court decided in both cases that state-law limitations periods applied to claims brought under these federal statutes.

## II.

## REVIEW IS NOT NECESSARY TO DETERMINE WHETHER THE COURT PROPERLY APPLIED CALIFORNIA'S ONE-YEAR STATUTE OF LIMITATIONS FOR TORTIOUS WRONGFUL DISCHARGE CLAIMS TO PETITIONERS' SECTION 510 ACTION

### A. There Is No Direct And Irreconcilable Conflict Among The Circuit Courts As To What State Statute Of Limitations To Apply ERISA Section 510 Claims.

Petitioners next contend that this Court must grant certiorari because the courts of appeal "differ widely" in their selections of statutes of limitation. (Petition, p. 15). However, this is not a "conflict" within the meaning of Rule 10. Rather, a conflict must ordinarily be "square and irreconcilable" and implicate a matter of federal importance in order for review to be granted. Supreme Court Rule 10(a); Stein, et al., *Supreme Court Practice*, 7th Ed. 1993, § 414, p. 168, citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981).[8]

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[8]Thus, for example, the Court previously granted review in this action to resolve a direct conflict between the circuit courts over whether § 510 actions may be based on the interference with "non-vested" as opposed to "vested" benefits. See Inter-Modal, supra, 137 L.Ed.2d at 768.

Contrary to Petitioners' assertions, the application of different statutes of limitations in different states poses no conflict requiring certiorari to resolve, but rather constitutes a natural by-product of the general rule that the courts borrow the limitations period applicable to the most analogous state-law cause of action for § 510 claims.

Petitioners first ignore the fact that almost all courts have construed § 510 claims as analogous to wrongful discharge or employment discrimination claims. See McClure v. Zoecon, Inc., supra, 936 F.2d at 778, and cases cited therein. Thus, in 1994, the Seventh Circuit borrowed the Illinois limitations period governing retaliatory discharge claims under § 510 actions [See Teumer v. General Motors Corp., supra, 34 F.3d at 550], and other federal courts have almost uniformly followed suit in characterizing claims under § 510. See Jaskilka v. Carpenter Technology Corp., 757 F.Supp. 175, 177 (D. Conn. 1991) (holding that a complaint alleging discharge for the purpose of depriving an employee of retirement benefits under ERISA bears a "close resemblance to a cause of action for wrongful discharge in violation of a clear mandate of public policy under Connecticut law"); Corkery v. SuperX Drugs Corp., 602 F.Supp. 42, 45 (M.D. Fla. 1985) (Section 510 action held analogous to an employment termination case); Bollenbacher v. Helena Chemical Co., 934 F.Supp. 1015, 1030 (N.D. Ind. 1996) (applying Indiana's statute of limitations for retaliatory discharge claims to § 510 actions); Giuffre v. Delta Airlines, Inc., 746 F.Supp. 238, 241 (D. Mass. 1990) (retaliatory discharge claim held analogous to § 510 claim under Massachusetts law).[9]

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[9]See also Barnett v. International Business Machines Corp., 885

After reviewing the numerous cases which applied limitation periods for wrongful discharge claims to § 510 actions, the Fifth Circuit in McClure acknowledged the Eighth Circuit's decision in Heideman v. PFL, Inc., 904 F.2d 1262, 1267 (8th Cir. 1990), which held that a contract analogue was appropriate -- but noted that the Heideman court adopted that limitations period "without analysis" and "without allocating more than one sentence to the issue of which limitation statute properly applied." Ibid., 936 F.2d at 779. The circuit court in Heideman in fact merely upheld the application of a six-year statute of limitations adopted from Tennessee law by the district court, which had merely (and, once again, without any analysis) held that such a limitations period applied to § 510 claim because it was also applicable to claims brought for the denial of benefits under 29 U.S.C. § 1132. See Heideman v. PFL, Inc., 710 F.Supp. 711, 720, n. 19 (W.D. Mo. 1989).

By affirming the application of California's one-year limitations period for wrongful discharge claims in violation of public policy contained in C.C.P. § 340(3) in this instance, the Ninth Circuit therefore acted in accord with most of the other circuit and district courts which have addressed the issue. Moreover, to the extent that certain circuit courts have applied limitations periods applicable to other kinds of claims to § 510 actions, such rulings can be reconciled by the obvious fact that causes of actions vary from state to state, as

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F.Supp. 581, 592 (S.D. N.Y. 1995)(citing McClure); Sutter v. First Union National Bank of Virginia, Inc., 932 F.Supp. 753, 757 (E.D. Va. 1996) (holding that Virginia's common law cause of action for wrongful discharge was most analogous to an action under § 510); Baradell v. Board of Social Services, 970 F.Supp. 489, 494 (W.D. Va. 1997).

do statutes of limitations. See Musick v. Goodyear Tire & Rubber Co., Inc., 81 F.3d 136, 139 (11th Cir. 1996). The courts have in fact recognized that there is no way to eliminate disparities among various limitations periods to applicable § 510 actions arising in different states, given the fact that this is the natural and inherent result of Congress' choice not to specify a limitations period for such claims. See Anhert v. Delco Electronics Corp., 982 F.Supp. 1320, 1327 (S.D. Ind. 1997).

Petitioners purport to identify only one situation in which courts have reached different results under the law of the same state. Petitioners claim that the Second Circuit's decision in Sandberg v. KPMG Peat Marwick, LLP, supra, 111 F.3d at 335 conflicts in this sense with the earlier decision of the Tenth Circuit in Held v. Manufacturers Hanover Leasing Corp., supra, 912 F.2d at 1207 (10th Cir. 1990) (Petition at 16). However, careful examination of the Second Circuit's opinion indicates otherwise. The Second Circuit expressly noted that New York does not have a cause of action for "wrongful discharge," and therefore could not use this analogue for § 510 claims. It therefore borrowed the limitations period from a New York workers' compensation statute (N.Y. Work. Comp. Law § 120). Significantly, the Second Circuit expressly considered the Tenth Circuit's decision in Held – which applied New York's six-year limitations period for breach of contract actions – but pointed out that the workers' compensation statute had not been adopted until 1994, and therefore was not available to the Held court. See Sandberg, supra, 111 F.3d at 336. This kind of evolving response to a changing statutory scheme simply does not constitute a "conflict" within the meaning of Rule 10.

The only other Circuit Court of Appeals decisions cited by Petitioners which did not apply a tortious wrongful discharge analogue to § 510 actions were issued by the Eleventh Circuit in Clark v. Coates & Clark, Inc., 865 F.2d 1237, 1241 (11th Cir. 1989) (applying two-year limitation period for enforcement of statutory rights under Georgia law) and Byrd v. MacPapers, Inc., 961 F.2d 157, 159 (11th Cir. 1992) (applying limitations period for retaliatory discharge for filing workers' compensation claim under Florida law) (See Petition, p. 16, n.6). However, neither Georgia nor Florida recognize common law causes of action for retaliatory wrongful discharge. See Borden v. Johnson, 196 Ga. App. 288, 289, 395 S.E.2d 628 (Ga. App. 1990) (rejecting any "public policy" exception to Georgia's at-will employment rule absent codification in statute); Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327, 1329 (Fla. App. 1985) and Smith v. Piezo Technology Professional Administrators, 427 So.2d 182, 184 (Fla. 1983) (confirming that no common law tort of retaliatory discharge exists in Florida, and that the legislature had prescribed a wrongful discharge cause of action in that state only for employees who are fired for bringing workers' compensation claims). The Clark and Byrd courts' borrowing of Georgia's and Florida's statutes of limitations for enforcement of a statutory claim and for retaliation for filing a workers' compensation action to the § 510 claims in those cases can therefore easily be reconciled and explained by the limited kinds of causes of action available in those states, and the absence of any tortious wrongful discharge analogue to apply to § 510 claims.[10]

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[10]For this reason, this case is a poor vehicle for instructing federal courts

This Court in fact largely disposed of Petitioners' contention in North Star Steel Co. v. Thomas, supra, 515 U.S. at 36, in which it was urged that a uniform federal statute of limitations should be applied to actions brought under the WARN Act. The Court there readily acknowledged that

> the practice of adopting state statutes of limitations for federal causes of action can result in different limitations periods in different States for the same federal action, and . . . that some plaintiffs will canvass the variations and shop around for a forum. But these are just the costs of the rule itself, and nothing about [the federal statute in issue] makes them exorbitant.

Petitioners have accordingly failed to demonstrate that a sufficiently direct, significant, and irreconcilable conflict presently exists among the circuit courts with respect to what state statute of limitations to borrow for § 510 claims. More significantly, they have failed to demonstrate how the Ninth Circuit's decisions in this case and in Burrey are in conflict with any other circuit court decision on the important question of *how* the statute of limitations should be

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on how to handle situations such as those confronted by the Second and Eleventh Circuits, in which the pertinent state law did not recognize a cause of action for wrongful discharge. In direct contrast to the cases from those circuits, this case *does* involve a state scheme in which there is an analogous wrongful discharge cause of action and associated limitations period. Thus, determining whether or not such a limitations period was properly applied in this instance would not assist the appellate courts with jurisdiction over states which do not have such causes of action, on which limitations periods should apply to § 510 claims.

determined for claims brought under § 510. Nor is there any conflict with this Court's past decisions; rather, the Ninth Circuit did exactly what it was supposed to do under the well-settled rules articulated in Reed and North Star for borrowing the most analogous state law limitations period to the "federal Act in need." The petition must accordingly be denied on this basis as well.

### B. The Ninth Circuit Properly Applied California's One-Year Statute Of Limitations For Tortious Wrongful Discharge Claims To Petitioners' Section 510 Claim

As previously noted, the Ninth Circuit applied a one-year statute of limitations under C.C.P. § 340(3) to Petitioners' § 510 action, as opposed to the three-year limitations period for causes of action based on liability created by statute contained in C.C.P. § 338(a).[11] Initially, the issue of which statute of limitations should be selected for application to § 510 claims in an individual state does not

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[11]Petitioners cite Barton v. New United Motors Manufacturing Co., 43 Cal.App.4th 1200, 1209, n.6 (1996) in support of their contention that § 338(a) should be applied to their § 510 claim because it is a "statutory claim that did not exist at common law." But this misses the point: applicable statutes of limitations in these circumstances are almost always borrowed from the most analogous *state-law cause of action*, because otherwise federal claims such as § 510 actions would always be governed by the limitations period for violations of various state statutes. See Clark v. Coats & Clark, Inc., supra, 865 F.2d at 1241 (court finds the "most analogous state law *claim* when adopting a limitations period to a federal law").

raise an issue of national importance, and is therefore an insufficient ground for granting review by this Court under Rule 10. Nevertheless, the Ninth Circuit properly applied the one-year statute of limitations period in this instance.

Petitioners principally contend that the Ninth Circuit erred in borrowing a state statute of limitations first clarified by an appellate court decision in 1996 to their § 510 claim filed four years earlier.[12] This argument, based on the particular history of an individual case, is even more narrow than the question of what limitations period should typically be borrowed from California law for application to § 510 actions, and therefore provides a patently insufficient ground for review. Moreover, this contention ignores the well-settled proposition that "a rule of law, once announced and applied to the parties in a controversy, must be given full retroactive effect by all courts adjudicating federal law." [See App. I at 6a-7a, citing Harper v. Virginia Department of Taxation, 509 U.S. 86, 96, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)]. The Ninth Circuit thus properly relied upon its 1998 decision in Burrey, which borrowed the one-year limitations period adopted by the California Court of Appeal in 1996 for tortious wrongful discharge claims in California.

In doing so, the Ninth Circuit in no way "did violence" to ERISA's "broad remedial purposes." (See Petition, p. 12). Congress and the courts have traditionally

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[12]Petitioners refer to the California Court of Appeal's decision in Barton, supra, 43 Cal.App.4th 1200. They continue to ignore the fact, however, that the Ninth Circuit found that the one-year statute of limitations under C.C.P. § 340(3) applied to claims for wrongful discharge in violation of public policy in a decision issued eight years earlier. See Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988).

applied shorter statute of limitations periods to labor-based claims which arise out of major consequences such as the loss of employment, since such consequences are "known to the employee from the moment the action occurs" and thus provide an immediate basis for an "adequate pre-filing inquiry" that Petitioners contend they should have had time to make. See Anhert, supra, 982 F.Supp. at 1326; see also Title VII of the U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1) (providing that employment discrimination claims are generally required to be filed within 180 days).

Indeed, Petitioners readily acknowledge the fact that the lower federal courts have routinely and consistently applied limitations periods of two years or less to § 510 actions, which would have barred their claim here. See Petition, n. 6 (citing cases applying two-year limitation periods under Alabama and Georgia law to § 510 actions); n. 7 (citing authority applying Texas' two-year wrongful discharge employment discrimination limitation to § 510 claim and Louisiana's one-year limitation period for wrongful discharge actions); Anhert v. Delco Electronics Corp., supra, 92 F.Supp. at 1326, and cases cited therein. Their contention that borrowing a limitations period of less than three years somehow contravenes ERISA's "remedial purposes" is therefore squarely at odds with the substantial body of case law applying shorter limitations periods to § 510 claims.

Moreover, to the extent that it is even relevant, the Ninth Circuit in Felton v. Unisource Corp., 940 F.2d 503, 511-12 (9th Cir. 1991), did not hold that a one-year statute of limitations would "interfere with the policy that underlies ERISA," as Petitioners contend. Rather, in adopting the two-year statute of limitations applicable to wrongful discharge

claims under Arizona law, the Felton court merely noted in dictum that this conclusion was supported by its own earlier decision involving a different ERISA claim, in which it said that importing too short a period of limitations under state law would "interfere with the strong federal policy that underlies ERISA." Id. at 513, citing Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 298 (9th Cir. 1987).[13] Felton was therefore entirely consistent with the Ninth Circuit's later decisions in Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. den. 511 U.S. 1083 (1994) and Burrey, supra, both of which held that the limitations period for § 510 actions in California is the one-year statute of limitations contained in C.C.P. § 340(3) for tortious wrongful discharge claims. Finally, to the extent that Petitioners contend otherwise, this presents only an intra-circuit conflict which has now been effectively resolved by Burrey, and is an insufficient ground for review.

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[13]Felton also expressly rejected the argument that Arizona's statute of limitations for actions based on violations of statutes should apply to ERISA § 510 claims. The court reasoned that to find that a § 510 claim is most analogous to a statutory claim, merely because ERISA is a statute, reflects "circular reasoning." Ibid., 940 F.2d at 512. The Barton court later agreed, reasoning that the cause of action for wrongful termination in violation of public policy is itself a "common law, judicially recognized cause of action, not a liability created by statute." Ibid., 43 Cal.App.4th at 1209, n.6. For this reason, Section 338(a) was therefore clearly not the appropriate limitations period to apply to Petitioners' § 510 claim.

## III.

## CERTIORARI IS COMPLETELY INAPPROPRIATE TO REVIEW WHETHER RESPONDENTS WAIVED THEIR STATUTE OF LIMITATIONS DEFENSE OR WHETHER THE LIMITATIONS PERIOD WAS TOLLED

Lastly, Petitioners contend that Respondents waived their statute of limitations defense by failing to raise it in their initial Rule 12(b)(6) motion filed in 1993. They also contend that the appropriate limitations period was somehow "equitably tolled" due to their ignorance of the limitations period prior to 1996. Both of these contentions are patently without merit and far too specific to the procedural circumstances of this case to warrant Supreme Court review. Because the statute of limitations defense here was raised in the answer and asserted in a motion to dismiss before trial, this case is easily distinguishable from the cases cited by Petitioners. See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (ninety-day limitation period for filing EEOC charge under Title VII held not jurisdictional and waived when not asserted until after settlement); Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 332-3, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (failure to raise defense until after trial); Van Sant v. American Express Co., 169 F.2d 355, 372 (1948) (failure to raise a statute of limitations defense at first trial before remand).

It is in fact well settled that a party may raise a defense of failure to state a claim upon which relief can be

granted in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. Fed. Rule of Civ. Proc. 12(h)(2). As the district court itself noted in a related action between the Santa Fe Respondents and Petitioners' labor unions, a defendant preserves an affirmative defense if it includes it in its answer to the plaintiffs' pleading. Wholesale & Retail Distribution Teamsters v. Santa Fe Terminal Services, 826 F.Supp. 326, 330 (C.D. Cal. 1993). Indeed, a defendant may even raise an affirmative defense for the first time on summary judgment, absent prejudice to the plaintiff. See Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984); Healy Tibbitts Construction Co. v. Insurance Company of North America, 679 F.2d 803, 804 (9th Cir. 1982).

Although the statute of limitations defense to the § 510 claim was not among the grounds that Respondents initially raised in their motion to dismiss filed in 1993, it was expressly included in the affirmative defenses pleaded in their Answers to the Second Amended Complaint filed in 1998. The defense was also specifically asserted on two occasions prior to that time in separate motions to dismiss plaintiffs' pleading following the remand of this action to the district court in 1997, and was raised again on summary judgment. Respondents therefore clearly did not waive this defense under established law, and the appellate court properly rejected this argument. (See Appendix I, p. 6a).

Nor could Respondents' failure to raise the statue of limitations defense in 1992, or Petitioners' claimed ignorance of the limitations period, have operated as any kind of "equitable tolling." (See Petition, p. 27). Where a state limitations period is applied to an action arising under a federal statute, the state's tolling provisions should be given

effect unless they conflict with the federal statute's goal. Hardin v. Straub, 490 U.S. 536, 538-44, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). As the Ninth Circuit noted, in California the application of equitable tolling principles requires some wrongdoing on the part of the defendant. (App. I, 8a). None was present here.

Moreover, under California law, equitable tolling does not excuse a plaintiff who is merely ignorant of the applicable limitations period, as opposed to the facts underlying the claim. Gutierrez v. Mofid, 39 Cal.3d 892, 898-99 (1985). It is awareness of facts, not of their legal significance, which starts the running of the statute of limitations. Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1109-10 (1988). Hence, Petitioners' claim that they were unaware of the limitations period applicable to § 510 actions is plainly insufficient to warrant an extended filing period. In any event, this question of the application of state law on equitable tolling to the specific facts and procedural circumstances of this case does not warrant Supreme Court review.

## CONCLUSION

For all of the foregoing reasons, the petition must be denied in all respects.

Dated: May 24, 2000

Respectfully submitted,

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No. 99-1704

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In The

# Supreme Court of the United States

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, ROBERT STEIN, and ROBERT JAQUEZ,

*Petitioners,*

vs.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, THE ATCHISON TOPEKA & SANTA FE RAILWAY CO., SANTA FE TERMINAL SERVICES, INC., SANTA FE PACIFIC CORPORATION, IN-TERMINAL SERVICES, INC., and MI-JACK PRODUCTS, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 pp

TABLE OF CONTENTS

Page

I. PETITIONERS HAVE NOT WAIVED THEIR ARGUMENT FOR APPLICATION OF A UNIFORM, ERISA-BASED LIMITATIONS TO CLAIMS UNDER SECTION 510 OF ERISA... 1

II. PETITIONERS' ARGUMENT FOR APPLICATION OF A UNIFORM FEDERAL LIMITATIONS TO CLAIMS UNDER SECTION 510 OF ERISA IS MERITORIOUS..... 3

III. THERE IS A CONFLICT AMONG THE CIRCUITS ON CHOOSING THE LIMITATIONS TO APPLY TO SECTION 510 CLAIMS..... 5

IV. APPLYING CALIFORNIA'S ONE-YEAR LIMITATION TO PETITIONERS' SECTION 510 CLAIM DEFEATED ERISA'S BROAD REMEDIAL PURPOSES..... 6

V. WAIVER OF STATUTE OF LIMITATIONS DEFENSE..... 8

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

Page

CASES

*Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965) ..... 9

*DeWitt v. Penn-Del. Directory Corp.*, 872 F.Supp. 126 (D. Del. 1994) ..... 4

*Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1990) ..... 2

*Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989) ..... 9

*Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1991) ..... 3

*Inter-Modal Rail Employees Ass'n v. Atchison, Topeka*, 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 936 (1997) ..... 8

*Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) ..... 2

*Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331 (2d Cir. 1997) ..... 4

*Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994) ..... 4

*Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288 (10th Cir. 1991) ..... 4

STATUTES

29 U.S.C. § 1001, ERISA § 2 ..... 8

29 U.S.C. § 1113, ERISA § 413 ..... *passim*

29 U.S.C. § 1140, ERISA § 510 ..... *passim*

29 U.S.C. § 1451, ERISA § 4301 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Cal. Code Civ. P. § 337 ..... 6

Cal. Code Civ. P. § 338(a) ..... 6

Cal. Code Civ. P. § 340(3) ..... 5

RULE

Supreme Court Rule 10(a) ..... 6

Supreme Court Rule 10(c) ..... 3

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In their Brief in Opposition to the Petition for Writ of Certiorari (hereinafter "Respondents' Brief") Respondents did not follow the order of points raised in the Petition. To facilitate the Court's consideration Petitioners will address the issues in the order raised by Respondents' Brief.

### I. PETITIONERS HAVE NOT WAIVED THEIR ARGUMENT FOR APPLICATION OF A UNIFORM, ERISA-BASED LIMITATIONS TO CLAIMS UNDER SECTION 510 OF ERISA.

Although importing into Section 510 the limitations from other parts of ERISA is not Petitioners' main point, we note that Respondents' claim of waiver derives from factually incorrect assumptions. Respondents disingenuously argue that this issue was not raised below, and thus should not be considered by the Court. In the actual development of the case before the Ninth Circuit, however, Petitioners argued in both their Opening Brief, at pages 19-20 and 39, and in their Reply Brief, at page 5, that in light of the three-year limitations in Sections 413 and 4301 of ERISA,[1] applying California's one-year personal claim limitation recently made applicable to common law wrongful discharge claims, was too short and interfered with Congress' broad remedial purpose for Section 510 claims.

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[1] 29 U.S.C. §§ 1113 and 1451.

While Petitioners in light of the Ninth Circuit's decision in *Felton v. Unisource Corp.*, 940 F.2d 503, 510 n.10 and 513 (9th Cir. 1990), did not explicitly advocate importation of the ERISA limitations into their Section 510 case, they clearly placed those statutes of limitations before the appellate court. Indeed, in its decision the Ninth Circuit noted the rule that federal limitations will apply if a state limitation interferes with federal policy (Pet. Writ Cert. at App. I, page 5a). Unfortunately, the Ninth Circuit fails to perceive the adverse impact upon enforcement of the national labor policy which its new (1998) approach produces.

Where a federal claim is properly presented, a party can argue any point to support that claim and is not limited to the precise arguments raised below. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-9, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995). The Court in its consideration of an issue on certiorari draws a fundamental distinction between a new claim and a new argument in support of the same claim. *Id.* The issue below was whether Petitioners' Section 510 claims were timely filed, and Petitioners now urge that certiorari be granted for the Court to decide that their claims were timely. Petitioners advocated the Ninth Circuit's adoption of California's three-year or four-year limitations so as not to do violence to Congress' broad remedial purpose underlying ERISA. In so doing Petitioners relied upon the three-year limitations in Sections 413 and 4301 of ERISA. The question of adopting a federal statute of limitation is therefore properly before the Court, no matter how oblivious Respondents may be to the irony of their assertion of waiver. *See* Section V, *infra* at page 8.

## II. PETITIONERS' ARGUMENT FOR APPLICATION OF A UNIFORM FEDERAL LIMITATIONS TO CLAIMS UNDER SECTION 510 OF ERISA IS MERITORIOUS.

Respondents point to a few courts which have opted not to import the three-year (and more) limitations in Sections 413 and 4301 of ERISA. Those decisions not to analogize to other sections of ERISA speak to little more than the need of the lower courts for direction in how they are to go about protecting the Congressional policy interest. Moreover, those cases are readily distinguishable. They appear not to have involved multiemployer plans such as the Teamsters funds involved in this discharge, or at most those courts rejected application of the federal limitation in Section 413 to Section 510 claims without any effort to develop a principled rule of decision. Here Petitioners argue that, in light of the broad remedial purposes behind ERISA and the imperative for uniform rules for multiemployer plans operating throughout the nation, ERISA's three-year limitations in either Section 4301 or 413 should apply instead of California's one-year personal claim limitation. This is an important question of federal law that has not been decided by the Court, but should be. Its presence makes this Petition ripe for a grant of certiorari. *See* Supreme Court Rule 10(c).

At page 7 of their Brief in Opposition, Respondents cite *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1991). *Held* rejected application of Section 4301's three-year limitation simply because that plaintiff was not covered by a multiemployer plan. *Id.* at 1200. Here, by contrast, Petitioners' rights to pension and

health and welfare benefits – interfered with by their "fire and rehire" discharge – were founded on the Teamsters National Master Freight Agreement and by the Western States Area Supplemental Agreement, both multiemployer plans covering employees in many states (E. 278-374).[2]

Respondents also cite *Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994). That decision did not analyze the possible application of the limitations in Sections 413 or 4301 to the Section 510 claim, but merely found that these and other federal statutes of limitations were "not applicable here." *Id.* at 546. Other decisions cited by Respondents, *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331 (2d Cir. 1997), *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288 (10th Cir. 1991), and *DeWitt v. Penn-Del. Directory Corp.*, 872 F.Supp. 126 (D. Del. 1994), discuss Section 4301's application to a Section 510 claim not at all. Likewise they engage in no meaningful analysis of Section 413's suitability as a source for analogy.

Respondents argue that the remedial section of ERISA covering multiemployer plans, Section 4301, is somehow less analogous to Petitioners' Section 510 claims than a state common law wrongful discharge limit drawn by case law from a state statute used for a host of unrelated torts such as false arrest and battery (Brief in Opposition at page 9). Respondents' argument provides no principled explanation for the incongruity between Congress having decided to allow at least three years for

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[2] References to the Excerpts of Record in the Ninth Circuit are made as "E."

other ERISA suits and the Ninth Circuit's decision that equally complex suits under Section 510 must be filed within one year. This case involves a mass "fire and rehire" discharge of all members of a collective bargaining unit in a calculated plan to strip away their rights to benefits set under existing multiemployer plans. This was not a piecemeal retaliatory discharge of one or a few employees for receiving benefits under a health plan. The plain language of Section 4301(1) makes a suitable source of analogy because it is more in harmony with the purposes of Section 510. "A . . . plan participant . . . adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." 29 U.S.C. § 1451(a)(1). ERISA's remedial provisions covering withdrawal from multiemployer plans share a common Congressionally-mandated policy with Section 510 that makes them far more analogous to this cause of action than is the California statute enacted for a wide variety of common law tort actions, *see* Cal. Code Civ. P. § 340(3).

## III. THERE IS A CONFLICT AMONG THE CIRCUITS ON CHOOSING THE LIMITATIONS TO APPLY TO SECTION 510 CLAIMS.

Respondents note that "almost" but not all (Brief in Opposition at page 12) of the circuit courts of appeal import a state's wrongful discharge limitation into a Section 510 claim. They cannot avoid conceding that the Eighth Circuit has adopted a wide array of contract limitations, and that the Eleventh Circuit in some states

imports those states' limitations for enforcement of statutory rights (Brief in Opposition at pages 13, 15). Application of either one of those analogies – written contract or statutory rights – by the Ninth Circuit here, instead of its labeling of these claims as "personal," would have resulted in a ruling that Petitioners' Section 510 claims were timely. The appropriate analogy should have been found by the lower courts in California's application of a four-year limitation in claims for breach of a written contract, Cal. Code Civ. P. § 337, or a three-year limitation in claims for enforcement of statutory rights, Cal. Code Civ. P. § 338(a). Thus, it is clear that a meaningful conflict exists among the circuits, and that this is a circumstance justifying certiorari. *See* Supreme Court Rule 10(a).

## IV. APPLYING CALIFORNIA'S ONE-YEAR LIMITATION TO PETITIONERS' SECTION 510 CLAIM DEFEATED ERISA'S BROAD REMEDIAL PURPOSES.

Respondents' main argument for the one-year limitation chosen by the court of appeals is that Congress has applied shorter limitations to other employment claims. Here, of course, Congress chose none and relied on the judiciary to fashion suitable policies to effectuate its policy choices by analogy to harmonious limitations. Respondents cite the 180-day limit for filing an administrative claim with EEOC under Title VII of the Civil Rights Act (Brief in Opposition at page 19). Significant differences exist, of course, between those claims and ERISA Section 510. EEOC claims are normally relatively straightforward. They typically proceed against one employer only, mostly on behalf of a single employee.

They require no financial analysis of an employer's changes of operations to determine if the discharge is pretextual. Section 510 claims often arise out of a mass discharge against an entire group of employees for the purpose of interfering with rights under multiemployer plans covering health and welfare and pension benefits. They require investigation into underlying employer financial and economic issues, as well as interviewing large groups of potential plaintiffs after a national search for counsel. There exists a large and well-defined bar of plaintiffs' counsel for EEOC cases in every major city.

In Title VII Congress made an explicit choice of the statute of limitations. In Section 510 of ERISA it did not. The most telling distinction may well be that the 180-day limit for presenting a Title VII claim to EEOC requires only that an administrative complaint be filed, often (or perhaps usually) without counsel. If EEOC cannot broker a solution after or while it conducts its investigation, the complainant's time to actually file a case in court runs only after receipt from EEOC of a right-to-sue letter.

In the analogous sections of ERISA, Sections 413 and 4301, Congress chose a three-year limitation. There is no good reason to infer that Congress intended that a statute of limitation shorter than three years should apply to a Section 510 claim, nor any basis to postulate that Congress thought Section 510 cases would be easier and quicker to file than those under Sections 413 and 4301.

Respondents point out that some circuit courts of appeal in importing state wrongful discharge statutes of limitations have imposed time limits of two years or less on Section 510 claims (Brief in Opposition at page 19).

Respondents' argument begs the issue. They make no showing that any of those courts considered in a systematic fashion whether such short limitations advanced or undermined ERISA's broad remedial purpose made explicit by Congress in 29 U.S.C. § 1001 and its other national labor policy choices embodied in Section 510. Petitioners contend that short limitations eviscerate those Congressional purposes.

## V. WAIVER OF STATUTE OF LIMITATIONS DEFENSE.

Respondents' argument against their having waived any statute of limitations defense assiduously avoids any address of the salient point, namely, whether Respondents forsook their defense by not pleading it until after Petitioners' first appeal to the Ninth Circuit **and** after this Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka,* 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 936 (1997). Respondents cite no authority in opposition to Petitioners' contention that the Ninth Circuit's ruling conflicts with decisions of this Court and another by the Third Circuit (*see* Petition at pages 25-7). Respondents fail to contest Petitioners' argument (*see* Petition at page 27) that Respondents enjoyed sufficient time in 1992 to formulate and plead by motion a full defense on the merits against this Section 510 claim, when this suit was filed over two years after the mass discharge, but chose not to contest on any statute of limitation issue. Thus, Respondents leave unaddressed the key policy concerns of the

Court in *Burnett*[3] and *Hardin*,[4] and leave unrebutted Petitioners' point of a sufficient conflict.

Similarly, Respondents provide no plausible explanation for their failure to raise the defense until 1997. The Court should grant certiorari to resolve whether Respondents waived their statute of limitations defense. This is a proper issue for the Court to grant certiorari because the Ninth Circuit's indulgent approach to Respondents' failure to plead in a timely fashion conflicts with the decisions of the Court and the Third Circuit previously cited. The court of appeals' harsh application of a new limitation, in sharp contrast to its indulgence of Respondents, is inconsistent with the broad remedial purposes of ERISA and at variance with the equitable focus of the Court's decisions cited above and in the Petition.

## CONCLUSION

For the reasons in this Reply and in their Petition, Petitioners pray that the Court grant certiorari to resolve all the questions presented for review. The importation by the Ninth Circuit into ERISA of California's statute of limitation intended for personal injury and wrongful death cases has completely frustrated Petitioners' long-running effort to vindicate their rights conferred by Section 510. This injustice is the product of the court of

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[3] *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

[4] *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989).

appeals' search for uniformity at the expense of enforcement of the national policy. Such judicial longing for clarity is a manifestation of the need for guidance by the Court. Clarity and simplicity of decision are not enough to justify undermining the national policy purposes.

Respectfully submitted,

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